No. 251.

Br. of Atty. Gen. (Clarke Clows) for Appellee.

Office Supreme Court U.S.
FILED
DEC 2 1901
JAMES H. McKENNEY,
Clerk.

Filed Dec. 2, 1901.

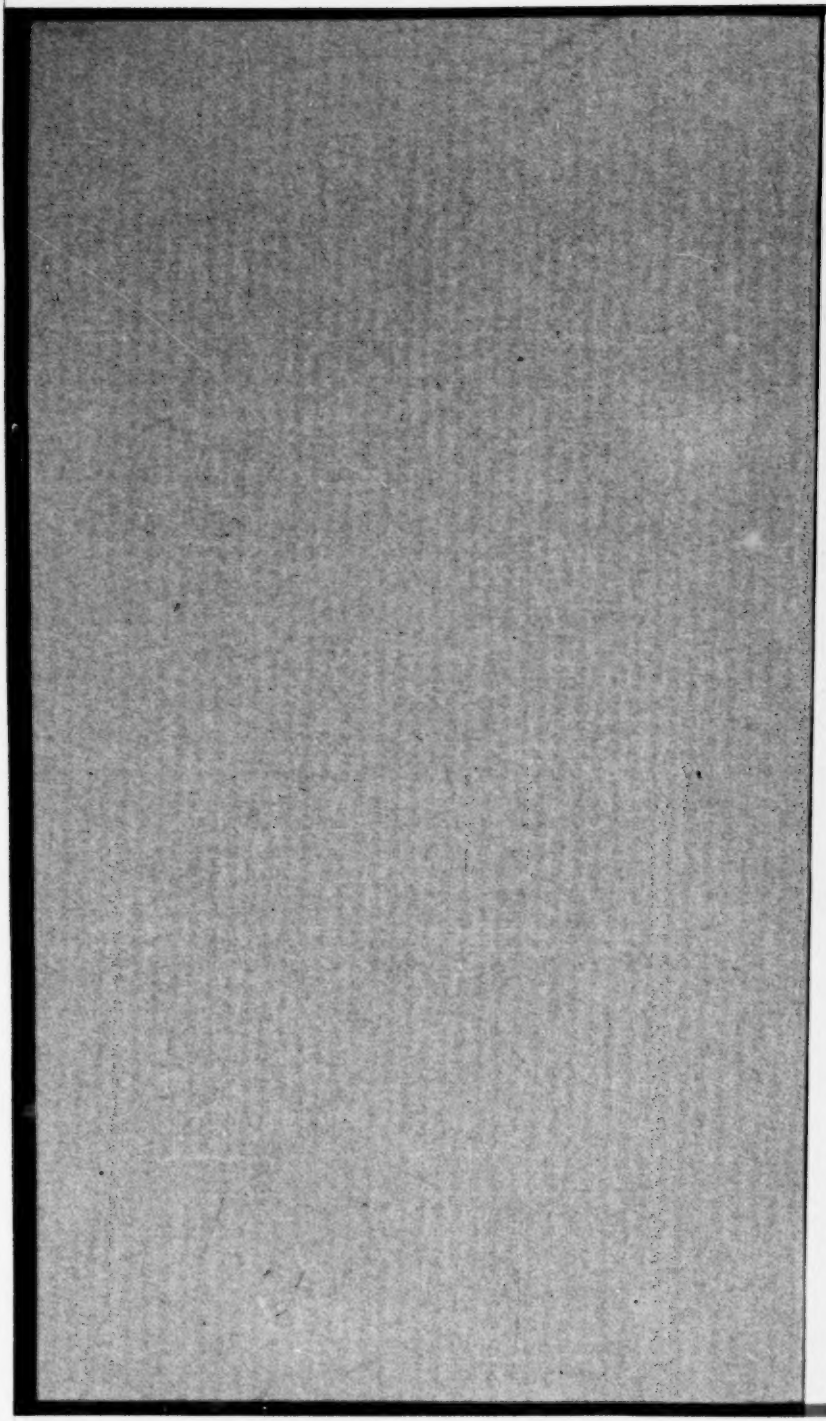
In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

I. STANTON CARTER, ON BEHALF OF Oberlin M. Carter, appellant,
v.
ROBERT W. McCLAUGHRY, WARDEN, etc.
} No. 251.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF KANSAS.

BRIEF FOR APPELLEE.



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No. 251

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF KANSAS.

STATEMENT.

This case comes before the court upon appeal from the order of the circuit court of the United States for the district of Kansas remanding Oberlin M. Carter to the custody of Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kans.

The appellant was held in custody by the warden in pursuance and by virtue of a sentence of imprisonment imposed upon him by a general court-martial of the United States, which sentence was duly approved by the President and ordered to be carried into execution, as is shown in General Orders, No. 172, Headquarters of the Army, Adjutant-General's Office, Washington, D. C., September 29, 1899. This order, which

also sets forth the charges upon which the prisoner was arraigned, his pleas, and the findings of the court, was made part of the return in this case, record, pages 50 to 70, folios 1412 to 1448.

As these charges are voluminous, there being 37 specifications, and the sentence in this case as approved by the President is based upon four charges each with but one specification, these charges, with their specifications, for convenience and ready reference, are copied from the transcript, and are as follows:

> CHARGE I.—Conspiring to defraud the United States in violation of the sixtieth article of war.
>
> *Specification II.*—In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, devising and intending to defraud the United States and to aid The Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, and Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said The Atlantic Contracting Company to obtain the allowance and payment of certain false and fraudulent claims hereinafter described; and in pursuance of the said conspiracy the said Oberlin M. Carter, in the months of June, July, and August, September, and October, 1896, being an officer of the United States in local

charge of the river and harbor district usually called the Savannah District, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals and contracts for certain works of improvement in the harbor of Savannah, Ga., in said district, and so manage and conduct said advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company afterwards, to wit, from about the 8th day of October, 1896, to July 31, 1897, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted for the United States, as and for the mattresses, stone, and other material contracted for; and did, on or about July 6, 1897, cause to be paid out of the moneys of the United

States, $230,749.90 to the said The Atlantic Contracting Company on account of the said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been.

And in further pursuance of the said conspiracy the said Captain Carter, about June, July, August, September, and October, 1896, did advertise for proposals for a contract for improving Cumberland Sound, Georgia, in said river and harbor district, and so manage and conduct the matter of such advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy, the said The Atlantic Contracting Company, from about the 8th day of October, 1896, to the 31st day of July, 1897, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other materials contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work, the said Captain Carter, in further pursuance of

said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for, and did, on or about July 6, 1897, cause to be paid out of the moneys of the United States $345,000 to the said The Atlantic Contracting Company on account of said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been.

This on the 6th day of June, 1896, and thereafter, to the 1st day of August, 1897.

CHARGE II.—Causing false and fraudulent claims to be made against the United States, in violation of the sixtieth article of war.

Specification VI.—In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of The Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: The claim represented by the following voucher, submitted by the said Captain Carter, with his accounts, and marked 'Appropriation for improving harbor at Savannah, Georgia:'

Voucher No. 8, $230,749.90, July, 1897;

and the claim represented by the following voucher, submitted by the said Captain Carter, with his accounts, and marked 'Appropriation

for improving Cumberland Sound, Georgia and Florida:'

Voucher No. 9, $345,000.00, July, 1897; which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into contracts, dated October 8, 1896, to furnish the United States certain mattresses, stone, and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone, and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it.

CHARGE III.—Conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war.

Specification II.—In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did willfully and knowingly cause the following

amounts to be paid out of the moneys of the United States subject to his order and control as officer in charge of said improvements to the Atlantic Contracting Company, a corporation; the accounts on which the said were paid being false, and the amounts paid not being due or owing from the United States to the said company, or to anyone, and he, the said Captain Carter, well knowing this to be the case; the said accounts and amounts paid and the payments being those designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia:'

Voucher No. 8, $230,749.90, July, 1897;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland Sound, Georgia and Florida:'

Voucher No. 9, $345,000, July, 1897;

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check, as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer.

CHARGE IV.—Embezzlement, as defined in section 5488, Revised Statutes of the United

States, in violation of the sixty-second article of war.

Specification I.—In that Capt. Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and harbor improvements in the Savannah River and harbor district, and, as such officer in charge of said improvements, being a disbursing officer of the United States, and having entrusted to him large amounts of public money of the United States, did willfully and knowingly apply for a purpose not authorized by law large sums of the said moneys so entrusted to him by willfully and knowingly causing the amounts hereinafter named to be paid out of the said moneys which were subject to his order and control as such officer in charge of said improvements, the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to anyone, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following voucher (and the entries therein and the endorsements thereon) submitted by the said Captain Carter with his accounts and marked "Appropriation for improving harbor at Savannah, Georgia:"

Voucher No. 8 ($230,749.90), July, 1897.

and the one indicated and designated by the following voucher (and the entries therein and the endorsements thereon), submitted by the said Captain Carter with his accounts and

marked "Appropriation for improving Cumberland Sound, Georgia and Florida:"

Voucher No. 9 ($345,000.00), July, 1897.

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States and under his control as such officer.

For a proper consideration of this case it will not be out of place to refer to its previous history:

Oberlin M. Carter, a captain of the Corps of Engineers of the United States Army, was brought to trial in January, 1898, before a general court-martial, legally convened by the President of the United States, upon charges and specifications set out in full in General Orders, No. 172, Headquarters of the Army, Adjutant-General's Office, Washington, D. C., dated September 29, 1899, and hereinbefore referred to. The trial took place at Savannah, Ga., and New York City, consuming a number of months, and was not finished until some time in May, 1898. As required by existing regulations and statutes, the record of the proceedings was submitted to the Secretary of War for the action of the President of the United States, but before being submitted to the latter, and after having passed through the hands of the Judge-Advocate-General of the Army, it was referred to the Attorney-General of the United States, who, on the 29th of September, 1899, one year

and four months after the conclusion of the trial by the court-martial, laid the whole proceedings before the President, with his opinion thereon, in which he recommended the action to be taken, which appears on the thirty-sixth page of said orders, No. 172, above cited, and part of the return in this case, Record, page 76, folio 1447.

Carter being in custody under the sentence of the court as approved by the President, he was on the 6th of October, 1899, brought before the circuit court of the United States for the southern district of New York, upon a writ of habeas corpus issuing out of that court, as a result of the petition of Abram J. Rose, his attorney.

Due return having been made to this writ and a full hearing having been had, it was discharged on the 23d of October, 1899, and the prisoner remanded to the custody from whence he was taken. At the same time a petition for an appeal to the circuit court of appeals for the second circuit from the order discharging the writ was presented and allowed. (See *In re Carter*, 97 Fed. Rep., 496; record, pages 85 to 90, folio 1800 to 1888.)

The appeal was duly heard, all arguments and briefs having been submitted, and on the 24th day of January, 1900, Judge Wallace, speaking for the circuit court of appeals for the second circuit, announced the judgment of that court, affirming the order dismissing the writ of habeas corpus with costs. (See 99 Fed. Rep., 948, record pages 97 to 100, folios 1820 to 1826.)

Before the mandate of the aforesaid court could be procured under its rules, the petitioner presented, on February 5, 1900, an application to this court for a writ of certiorari to the circuit court of appeals for the second circuit. This application was denied on the 26th of February, 1900, but no opinion rendered. (See 176 U. S., 684.)

On the same day an appeal from the final order of the circuit court for the southern district of New York, directly to this court, was allowed by Judge Lacombe, before whom the original hearing had taken place, as also a writ of error.

This court, upon the motions to dismiss or affirm submitted by the Solicitor-General of the United States on behalf of the appellee and defendant in error on April 23, 1900, dismissed the said appeal and writ of error. (See *Carter* v. *Roberts*, 177 U. S., 496.) And upon issuance of a mandate of the circuit court, southern district of New York, the prisoner was sent to the place designated under his sentence, namely, the United States penitentiary at Fort Leavenworth, Kans.

On the 17th day of October, 1900, said Oberlin M. Carter, through I. Stanton Carter, applied to the United States circuit court for the district of Kansas for a writ of habeas corpus, which was allowed. Due return thereto having been made and the prisoner produced on November 23, 1900, the case was heard "upon petitioner's oral motion to discharge said Carter, based upon the averments of respondent's return, no

evidence having been offered or considered by the court." (Record, p. 108, folio 2123.) On December 10, 1900, the writ was discharged and the prisoner remanded to the custody from whence he was produced. (Record, p. 108, folio 2123.) (See also opinion of court in this case, Record p. 102 to 108, folios 2114 to 2122, and *Carter* v. *McClaughry*, 105 Fed. Rep., 614.) An appeal from the said order and judgment to this court was allowed on December 10, 1900. (See Record, p. 109, folio 2124.)

The attorney for appellant on page 5 of his brief makes the surprising statement that under the pleadings of the case in the lower court certain matters were admitted, and that among them the respondent admitted as follows:

> That there was no evidence adduced before the court-martial tending to show any guilt on the part of said Carter. That the evidence before the court-martial showed that the money paid out by Carter, as alleged in the specification to Charge IV, was paid by him under and in accordance with the specifications of two certain contracts between the United States of America and the Atlantic Contracting Company, dated September 8, A. D. 1896, for the improvement of Savannah Harbor and Cumberland Sound, respectively, which said contracts were entered into pursuant to the act of Congress approved June 3, 1896.
>
> That under the act of Congress approved September 27, 1890, the President, by an order dated March 20, 1895, fixed the maximum punishment for a violation by an enlisted man of

the United States Army of the sixtieth article of war, and also for a violation by such person of the sixty-second article of war by embezzlement of more than $100, at a term of four years' confinement at hard labor under each article. That the President also promulgated on October 31, 1895, certain army regulations, and among them "Article 938. Whenever by any of the Articles of War, punishment is left to the discretion of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the manual for courts-martial, published by the authority of the Secretary of War."

That the limits above mentioned are the limits prescribed in said manual, and article 938 above set out was in force when said court-martial passed sentence on said Carter.

The claim that any admissions were made on the part of respondent is wholly erroneous; no allegation of any kind recited in the petition for the writ purporting to impeach the legality of the court-martial proceedings or the sentence was admitted by the respondent in his return, and no such admissions can be deduced from the pleadings as of record before the court. The respondent, with his return, submitted in evidence the full record of the proceedings under which the petitioner was held,-viz, General Orders, No. 172, and he particularly averred in connection therewith "that the said Carter has been lawfully convicted and sentenced by the said general court-martial which

had jurisdiction of the person of the said Carter and of the various offenses for which he was tried." (Record, p. 48, folio 62.) The respondent also resisted, in his return, the admission by the court below of any evidence for the purpose of retrying the issue of facts determined by the court-martial, for the court below had no power to inquire whether the evidence was sufficient to sustain the conviction. (Record, p. 50, folios 64 to 65.)

And in the conclusion of this return the respondent, for the reasons set forth, prayed the court to dismiss the said writ. (Record, p. 50, folio 65.)

It will thus be seen that all the various allegations of the petitioner set out by him and claiming the release of the prisoner from his imprisonment on account of the illegality of the latter have been most emphatically denied in the return and by the record produced showing the trial, conviction, and sentence. Moreover, in the brief for respondent every one of the said allegations of the petitioner are specifically denied, most strongly contested, and controverted.

The action of the court below, as shown by its decree and opinion, further negatives the extraordinary claim of the appellant's attorney in these particulars.

The attorney for the appellant is further in error when he says, on page 5 of his brief:

> To this return the petitioner demurred. The record in the case, page 108, shows 'said case came on for a hearing upon petitioner's oral motion to discharge the said Oberlin M. Carter, based upon the averments of respondent's re-

turn, no evidence having been offered or considered by the court.'

It is conceded that the effect of a motion to discharge has the same effect as a demurrer, for by that motion the return is conceded to be true.

Under the circumstances the simple issue of law arose as to the sufficiency of the return.

Church on Habeas Corpus, second edition, page 160, in relation to the subject under discussion, says:

> The return of a writ of habeas corpus imports verity until it is impeached, and when made * * * by a public officer, in his official capacity, the facts therein stated will be taken as true, without reference to the allegations in the petition unless an issue as to these facts is raised by an appropriate pleading on the part of the petitioner. This pleading is usually in the form of an answer denying the allegations of the return. The return should be responsive to the writ, and not to the petition upon which it is based. And when the return sets out in full the record of the proceedings under which the prisoner is held it is a full and complete answer to every allegation contained in the petitioner's application for his discharge, and being admitted as true negatives the same.

And in paragraph 169 of the same work it is stated:

> The sufficiency of the return in law may be tested on a motion to discharge the prisoner, and the motion has the effect of a demurrer * * * on a motion to discharge the facts stated * * * in the return are conceded to

be true. On a motion to discharge the prisoner the sufficiency of the return alone is examined.

The appellant's attorney concedes at the outset that the application for the writ of habeas corpus can not be used as a substitute for a writ of error, and he admits that no mere error or irregularity in the proceedings of the court-martial can be taken advantage of in this appeal. And further, that unless he can convince this court that the military tribunal acted beyond its power in such manner as to render its sentence void, in whole or in part, this proceeding must fail; the court-martial must have exceeded its jurisdiction somewhere along the line or applicant can not prevail.

But notwithstanding these declarations the attorney for appellant persists in basing his contentions upon alleged errors of the court-martial that certain specifications did not support the charge; that the evidence did not justify conviction; that certain findings were void; that although there are four separate charges only two separate crimes were in reality charged; that therefore the appellant was put in jeopardy for the same offense more than once.

All these are matters of defense which were within the jurisdiction of the trial court and should have been submitted to it in appropriate pleas for its decision, and if they had been so submitted and determined adversely to the prisoner they might have been brought as errors before the reviewing officer by way of appeal; but they can have no standing or consideration in a habeas corpus proceeding, as will be shown hereinafter.

It is to be remembered that in his petition to the

court below and in his brief before this court the appellant does not specifically deny the jurisdiction of the court-martial over the offender or the offenses, and in point of fact concedes the legality of so much of the sentence as imposed fine and publication of the offense, but maintains that the remainder of the sentence is illegal for the reasons alleged in the petition.

Before proceeding to the discussion of the questions at issue in the case it is deemed proper to invite attention to the fact that the brief of appellant does not contain an assignment of errors, but instead (p. 15) he gives a so-called "specification of errors." A comparison of this specification with the asssignment of errors (Record, pp. 109 and 111, folios 2125–2129), upon which the appeal in this case was granted, shows that the former are not wholly responsive to the latter and that they differ in several particulars. The second assignment of errors and the first additional and amended assignment of errors are wholly omitted; in the former it is alleged that the sentence of imprisonment is void because the court-martial had no power to inflict the same under the sixtieth article of war, and the latter avers that the sentence imposed is in violation of the one hundred and second article of war, Carter having by said sentence been twice punished for the same offense.

Attention is invited to this discrepancy, because the consideration of at least the latter error has an important bearing upon the point whether there is any constitutional question at all at issue in this case or was decided by the court so as to sustain this appeal.

After first considering the principle of law which, it is believed, should govern this court in its action upon the case, it is proposed to take up in their order the points discussed in the brief of the appellant.

ARGUMENT.

POINT I.

The court-martial which tried, convicted, and sentenced the petitioner, being a lawfully constituted court, the proceedings thereof could be reviewed by the circuit court for the following purposes only: (1) To ascertain whether said court had jurisdiction of the person and the subject-matter; (2) whether the judgment rendered and the sentence imposed were such as the court had power to render and impose under the law.

The Constitution of the United States provides in section 8, Article I, that Congress shall have the power to make rules for the government and regulation of the land and naval forces of the United States. Pursuant to such power, Congress, by statute, enacts rules for the government and regulation of the Army, known as Articles of War. Section 1342, Revised Statutes, Article I of said section, provides: "That every officer, before he enters upon the duties of his office, must subscribe to the said rules and articles." The force and effect of an officer of the Army subscribing to said rules is to place himself directly within the power of courts-martial to try and determine any offense which he may have committed in contravention of the Articles of War, and take from him the privilege, which he otherwise would have, of having trial for all offenses that might be charged against him instituted

in the civil courts for the proper State and district. (*Ex parte Milligan*, 71 U. S., 123.)

When therefore a court-martial has been instituted for the purpose of trying any person in the military establishment for any offense and that offense is shown to have been perpetrated while the party is subject to the rules and regulations of the Army, then it must be conceded that the court has full jurisdiction and power to arraign, try, and sentence the party, pursuant to the provisions of said Articles of War, and that power is as inherent and inviolable in that court as the power of any civil tribunal to arraign, try, and sentence any person for an offense committed against the laws of the United States of which it has cognizance. In other words, courts-martial as independent tribunals have as complete power and authority to judicially and finally determine any cause before them over which they have jurisdiction as any other court under the Constitution and laws of the United States. It follows, therefore, that full credence to their conclusions must be given by all tribunals, and it appearing from the record in this case that the appellant was an officer of the United States Army, it must be conceded that the court-martial which tried him had full power to judicially try and determine the charges and specifications with which he was charged, especially so when the record shows that the charges and specifications set forth offenses which he is alleged to have committed while a commissioned officer in the Army of the United States.

The civil courts in passing upon the power of courts-martial to judicially determine offenses in violation of the Articles of War have uniformly held that the power of that court to arrive at a final determination is as inherent as that of any court constituted under the Constitution and acts of Congress.

In *Ex parte Davison* (21 Fed. Rep., 620), Judge Wallace, discussing the power of courts-martial, says:

> Courts-martial are lawful tribunals existing by the same authority that this court is created by, have plenary jurisdiction over offenses by the law military as this court over controversies committed to its cognizance, and within their special and more limited sphere are entitled to ask untrammeled an exercise of their powers.

In *Ex parte Reed* (100 U. S., 13), which appertains to the use of the writ of habeas corpus to review the proceedings of a naval court-martial, the court held:

> That court had jurisdiction over the person and the case. It is the organism provided by law, and clothed with the duty of administering justice in this class of cases. * * * Its judgments, when approved as required, rest on the same basis and are surrounded by the same consideration which give conclusiveness to the judgment of other legal tribunals, including as well the lowest as the highest under like circumstances.

In *Re McVey* (23 Fed. Rep., 879) it is held:

> It is not denied that within the sphere of their jurisdiction the judgments or sentences of mili-

tary courts are as final and conclusive as those of civil tribunals of last resort.

To have enabled the court below, therefore, to inquire into the proceedings of the court-martial herein by means of the writ of habeas corpus it must be considered that such inquiry by means of the writ of habeas corpus is for the purpose of ascertaining for what cause the prisoner was restrained of his liberty (752 Revised Statutes), for unless it proceeded upon the theory that he was restrained of his liberty in violation of the laws of the United States, no jurisdiction in the court below for such inquiry under any pretext could be claimed.

The circuit court could only review the proceedings of the court-martial for the purpose of ascertaining two things: First, whether the court had jurisdiction of the persons of the petitioner and the subject-matter of the offenses; second, whether having such jurisdiction and having arrived at its conclusions the sentence which it imposed was one which it was warranted in imposing by virtue of law. So far the circuit court could go in its inquiry and no further.

As a proposition of law it can not be claimed by the appellant that such an inquiry by means of a collateral proceeding could extend further than this; and not one case can be cited by him extending the power of inquiry by writ of habeas corpus beyond this contention.

If, therefore, upon the face of the proceedings it appears that the court-martial had jurisdiction, as before

stated, and then imposed a sentence which it could legally impose, the circuit court's inquiry necessarily ended, and it was justified in discharging the writ and remanding the prisoner.

The court-martial as a legally constituted court having the proper jurisdiction, had the right to determine for itself the procedure under the Articles of War.

It had the right to determine whether the respective charges and specifications were properly pleaded and whether or not the evidence submitted upon the trial warranted the conviction under one charge or another, and it having thus determined for itself its conclusions can in no wise be reviewed, except by a court erected with appellate power in the premises, and such appellate power can not be claimed for a court which simply reviews by means of the power of habeas corpus.

It has uniformly been held that a writ of habeas corpus does not possess the functions of a writ of error, whereunder upon a proper bill of exceptions, the errors in the pleadings, at the trial or in the judgment, may be reviewed.

In *Ex parte Tobias Watkins* (3 Pet., 193; Marshall, J.), it was held:

> That the question of whether an offense was committed—that is, whether the indictment did or not show that an offense had been committed—was a question which the district court was competent to decide. If its judgment was erroneous, still it is a judgment and until reviewed can not be disregarded.

In *Re McVey* (23 Fed. Rep., 879) the court said:

> The only authority of the civil courts is to answer whether the military authorities are proceeding regularly within their jurisdiction. If they are, we can not interfere, no matter what errors may be committed in the case of a lawful jurisdiction.

In *Dynes* v. *Hoover* (20 How., 81), was held:

> Of the sentence of courts-martial which have been convened regularly and have proceeded legally and by which punishments are directed, not forbidden by law, or which are according to the customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them.

See also *Ex parte Reed* (100 U. S., 23).

In *Ex parte Yarbrough* (110 U. S., 631) this court said, after passing upon the question of the court's right to inquire into the jurisdiction:

> It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of habeas corpus into a writ of error by which errors of the law committed by the court that passed the sentence may be reviewed here, for if that court had jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounces, this court can inquire no further.

See also *Keyes* v. *The United States* (109 U. S., 336).

To the same effect it was held in *Ex parte Siebold* (100 U. S., 375):

> That a writ of habeas corpus could not be used as a mere writ of error.

In the case of the *United States* against *Grimley* (137 U. S., 147), arising under a habeas-corpus proceeding and involving the jurisdiction of a court-martial, this court held:

> It can not be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and, if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence; and, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of the court-martial and that no mere errors in their proceedings are open to consideration. The single inquiry is jurisdiction. That being established, the habeas corpus must be denied and the prisoner remanded. That wanting, it must be sustained and the prisoner discharged.

This brings us, therefore, to the second consideration—as to whether the sentence imposed was one which the court could legally impose.

To entitle this court to overthrow the sentence imposed by the court-martial it would have to be shown that the sentence imposed was not merely erroneous or voidable, but so far erroneous as to be absolutely void or a nullity ab initio.

In other words, the inquiry would naturally relegate

the question back again to a jurisdictional consideration.

In *United States* v. *Pridgeon* (153 U. S., 59), it was held:

> Habeas corpus proceedings being a collateral attack of a civil nature, it must clearly and affirmatively appear that the indictment charged an offense over which the court had no jurisdiction, so that its sentence was void, or, in other words, the indictment must be so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence that the court pronounced thereon was void.

Eliminating from the appellant's brief those contentions which claim the sentence void by reason of a departure by the court-martial from the rules of procedure prescribed by the statute, the gist of the complaint is that the court had no power to impose a sentence of fine and imprisonment, because although the appellant was found guilty of embezzlement as defined by section 5488 of the Revised Statutes, in violation of the sixty-second article of war, and although under that charge and in pursuance to that article fine and imprisonment could be imposed, yet the offense as set forth under Charge IV showed it to be directly within the provision of the sixtieth article of war and should, therefore, have been properly triable thereunder, making the fine thereunder void and punishment on account of the same illegal, and that the sentence provided under said article 60—that is to say, fine or imprisonment—only could be imposed.

It will not be attempted under this point to specifically answer such contentions, but they are alluded to for the purpose of showing that under the proposition that the sentence must not merely be erroneous, but absolutely void, and therefore, going to the jurisdiction of the court to impose it, that the circuit court in reviewing under the writ of habeas had no right to take upon itself the burden of disturbing the sentence, if it appears from the record that the prisoner had been found guilty under any article of war, under which an offense was charged and under which the sentence of fine and imprisonment could be imposed, and that court could not constitute itself a court of appeals to determine under which charge the prisoner should have been tried, nor under which article the sentence should have been imposed, provided either or any article set forth empowered the court to impose the sentence that was imposed.

Bearing in mind that to be attacked collaterally the proceeding and sentence of the court-martial must be shown to lack the necessary jurisdictional requisites, it will be seen that, if such requisites appear in conformance with the contention and authorities above cited, a complete general answer has been made to Points I and II of appellant's brief.

A summary of the points in the petition of the petitioner amounts to this: That the evidence adduced before the court-martial did not show that any crime whatever had been committed, and that consequently, in imposing the sentence, the court acted beyond its

jurisdiction; that the evidence and specifications under the fourth charge show that the two sums of money alleged to have been paid out "for a purpose not authorized by law" were legally paid out by Carter; that the facts set out in this specification to the fourth charge, if justifiable at all, were not cognizable under the sixty-second article of war, but should have been brought under the sixtieth article of war; that the evidence and the charges with the specifications under them showed that the payment by the said Carter of the two checks mentioned in the said specifications were the only basis of the four charges in this case; the single act of drawing the said two checks have been carved up into four distinct and different crimes; that the facts set out under Charges I, II, and IV brought the offenses therein described under the sixtieth article of war, under which the said court-martial had jurisdiction only to inflict a fine or imprisonment or some other punishment in the alternative, but not cumulatively.

It is respectfully submitted that, if such contentions have any force, they would constitute error merely on the part of the trial court, which could have been taken advantage of by the requisite and appropriate motions, and if dissatisfied with the rulings thereon, to ask that such errors be corrected when the case came up for review by the reviewing officer designated in the statute, namely, the President of the United States.

If the trial court had jurisdiction, it was competent to decide under which charge the accused should be

tried; whether an offense under the facts lay under article 60 or 62, and whether or not the evidence submitted warranted conviction; in fine, to proceed duly to determine upon the evidence adduced the guilt or innocence of the prisoner. The decision of the trial court upon these matters could not be reviewed collaterally by the court below, nor can it be so reviewed by any other court. The authorities are uniform in holding that the trial court must of itself determine the sufficiency of the charges and specifications before it and of the evidence adduced in their support.

In *Dynes* v. *Hoover* (*supra*) it is expressly held:

> It is in the nature of an appeal to the officer ordering the court, who is made by the law the arbiter of the legality and propriety of the court's sentence, and when such sentence is confirmed it is beyond the jurisdiction or inquiry of any civil tribunal whatsoever, unless it shall be shown that the court had no jurisdiction, or in which, having jurisdiction, it has failed to observe the rules prescribed by the statute for its exercise. * * *
>
> With the sentences of courts-martial which have been convened legally and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the

> United States, from whose decision no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.

In *Ex parte Parks* (93 U. S., 18) it was contended that the facts constituting an alleged forgery, set forth in an indictment, did not constitute a crime by any act of Congress, and that, as the United States had no common law jurisdiction of crimes, it therefore had no jurisdiction to try him for that offense. Justice Bradley, writing the opinion, says:

> But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court and within its jurisdiction. No other court except the circuit court for the same district having concurrent jurisdiction was as competent to decide the question as the district court. * * * Whether an act charged in an indictment is or is not a crime by the law which the court administers is a question which has to be met at almost every stage of criminal proceedings on motion to quash the indictment, on demurrers, on motions in arrest of judgment, etc. The court may err when it has jurisdiction of the question. If it errs there is no remedy after final judgment, unless a writ of error lies to some superior court. * * * Now it has been held that a mere error in point of law committed by a court in a case properly subject to its cognizance can only be reviewed by the ordinary methods of appeal, or writ of error, but that where the proceedings are not only erroneous but entirely void—as

> where the court is without jurisdiction of the person or of the cause, and a party is subjected to illegal imprisonment in consequence—a superior court or judge vested with the prerogative power of issuing a habeas corpus may review the proceedings by that writ and discharge from illegal imprisonment. * * * But in the case before us the district court had plenary jurisdiction both of the person, the place, the cause, and everything about it. To review that decison of that court by means of the writ of habeas corpus would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court.

In *Swaim* v. *The United States* (165 U. S., 561) it was, among other things, urged that no offense under the sixty-second article was shown by the facts to have been perpetrated by the petitioner, and that the Court of Claims should have so found and held the sentence void. The court said:

> If this position were well taken it would throw upon the civil courts the duty of considering all the evidence adduced before the courts-martial to determine whether the accused was guilty of conduct prejudicial to good order and military discipline, in violation of the Articles of War; but, as the authorities heretofore show, this is the very matter that falls within the province of courts-martial in respect to which their conclusions can not be controlled or reviewed by civil courts.

In re Bogart (2 Sawyer, 396) it appears that Bogart, a clerk to a paymaster of the United States

Navy, was charged before a court-martial with the crime of embezzlement, desertion, etc. Among other defenses the prisoner pleaded in bar a former trial and conviction on the same state of facts, and also set up the statute of limitation. The court, among other things, said:

> If the court-martial has jurisdiction to try the offense charged, then the prisoner is lawfully held for trial. All else relates to the exercise of jurisdiction with which this court can not interfere. We can not enter into any examination of the merits of the charges. * * * Has the court-martial ordered the power to hear and decide upon the charges and specifications made by the Secretary of the Navy? If so, that ends our inquiry. As to the alleged former conviction and the bar of the statute of limitations, these are matters of defense, and are questions for the tribunal having jurisdiction to try the charge.

In re White (17 Fed. Rep., 724), the petitioner was arrested on a charge of desertion for trial before a court-martial. Among other defenses he interposed that of the bar raised by the statute of limitation. The court said:

> The jurisdiction is clearly conferred upon the courts-martial and it is exclusive. This covers the whole ground. Jurisdiction to determine whether a party is guilty of the offense necessarily involves the jurisdiction to determine what constitutes the offense under the statute;

that is to say, jurisdiction to construe the statute and to adjudge it, etc. * * * If the military authorities proceed regularly within their jurisdiction, we can not interfere, no matter what errors may be committed in the excess of its lawful jurisdiction.

* * * Whether it makes error in its proceedings is immaterial, inasmuch as this court has no jurisdiction to review and correct those errors directly or by indirection through a writ of habeas corpus. * * * It is enough for us that whether the offense is the same is a question to be decided upon a plea of former acquittal, and that this question was actually decided by a court which was competent to entertain it. If its decision was erroneous, we have no power to review that error.

See also *Ex parte Yarbrough* (110 U. S., 654).

In re Eckart (166 U. S., 482) it was held:

That a trial court possessing general jurisdiction of the class of offenses within which is embraced the crime set forth in the indictment is possessed of authority to determine the sufficiency of the indictment, and that in adjudging it to be sufficient it acts within its jurisdiction, and a conviction and judgment thereunder can not be questioned upon habeas corpus because of a lack of certainty or other defect in the indictment of the facts averred to constitute a crime.

In the case of *Rose ex rel. Carter, appellant*, v. *Roberts, appellee*, which has heretofore been referred to in this case, and the opinion in which has been made part of

the return, Judge Wallace, in speaking for the circuit court of appeals, second circuit, held:

> It is not the office of a writ of habeas corpus to perform the functions of a writ of error in reviewing the judgment of a court-martial. Courts-martial are tribunals created by Congress in pursuance of the power conferred by the Constitution, and have as plenary jurisdiction of offenses committed to them by the law military as do the circuit and district courts of the United States in the exercise of their statutory powers over other offenses. The question of jurisdiction may be reached by such a writ as it may be when the judgment of the tribunal is attacked; but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine and to render the particular judgment or sentence imposed; but if this exists, however erroneous the proceedings may be, they can not be reviewed collaterally or redressed by habeas corpus. These principles have been repeatedly declared by the authorities. *In re Davidson* (21 Fed. Rep., 618); *ex parte Reed* (100 U. S., 13); *in re Coy* (127 U. S., 651); *United States* v. *Pridgeon* (153 U. S., 59).

When the case just quoted came before this court for decision upon the motions to dismiss or affirm, Mr. Chief Justice Fuller, in speaking for the court, held:

> The eighth section of Article I of the Constitution provides that the Congress shall have power to make rules for the government and regulation of the land and naval forces, and in

> the exercise of that power Congress has enacted rules for the regulation of the Army known as the Articles of War (Revised Statutes, section 1342). Every officer, before he enters on the duties of his office, subscribes to these articles and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them. Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunal, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter and whether, though having such jurisdiction, it had exceeded its power in the sentence pronounced. (177 U. S., 498.)

In discharging the writ of habeas corpus in this case the court below in its opinion stated in part (see Record, p. 104, folio 2116, 2117):

> The limited scope of inquiry in a case of this character is well defined by many decisions. A writ of habeas corpus can not be converted into a proceeding in error. A court to which an application is made for the discharge of one restrained of his liberty pursuant to the judgment and sentence of another court can not inquire whether the evidence was sufficient to warrant conviction, nor consider whether in the progress of the trial errors were committed by the trial court as to matters within its jurisdiction. In such a case the writ of habeas corpus is in effect a collateral attack, and if the court pronouncing

the sentence had jurisdiction of the accused and of the offense for which he was on trial did not exceed its jurisdiction in the imposition of the sentence the case is not open to further inquiry. Courts-martial are independent tribunals created by the same authority to which this court owes its existence and they have as complete power and jurisdiction to judicially determine any cause before them involving offenses under the Articles of War as this court has over controversies committed by law to its cognizance. The limitations on the power of this court to inquire into matters connected with the judgments of other civil courts, by means of the writ of habeas corpus, apply with equal force to the judgments of courts-martial. This consideration is sufficient to eliminate a number of petitioner's objections without further discussion.

In the light, then, of the foregoing authorities, when applied to the allegations made, it is quite clear that counsel for petitioner sought in the court below to convert the writ of habeas corpus into a writ of error, and judging from his brief persisted in doing the same thing in this court. If the authorities referred to clearly decide any question at all, it is that the courts-martial alone could determine under what articles of the Articles of War the accused should be tried; that it was solely within its province to hear and determine the question whether the accused is guilty of any of the offenses created by the Articles of War, and to impose such penalties as the respective articles warranted, and its decision with regard thereto

could not be reviewed by the court below, nor can this be accomplished by an appeal to this court.

This, then, brings us down to a special consideration of the respective points raised in appellant's brief.

POINT II.

The finding of "guilty" under charge four and its specification was not beyond the legal powers of the court-martial, and not illegal and void, for this charge and its specification set out an offense of which the court-martial had jurisdiction, and its findings thereon can, therefore, not be reviewed by or attacked under the proceedings upon the writ of habeas corpus.

A.—THE SPECIFICATION WAS NOT WRONGLY LAID UNDER THE SIXTY-SECOND ARTICLE OF WAR, BUT SETS OUT AN OFFENSE UNDER THAT ARTICLE.

Under article 62, an officer of the military establishment who has been intrusted with funds of the United States, as disbursing officer, for the purpose of disbursement, can be tried by court-martial for embezzlement if he * * * unlawfully withdraws from the treasurer or any assistant treasurer, or any authorized depository, or unlawfully transfers, or for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, for this is an offense created by section 5488, Revised Statutes.

Section 5488 provides that: "Every disbursing officer of the United States, who deposits any public moneys intrusted to him in any place or in any manner, or converts it to his own use in any way whatever, or loans with or without interest, or for any

purpose not prescribed by law, withdraws from the treasurer or any assistant treasurer, or any authorized depository, or for any purpose not prescribed by law, transfers or applies any portion of the public funds intrusted to him, is in every such act deemed guilty of embezzlement of the money so deposited, converted, loaned, withdrawn, transferred, or applied, and shall be punished by imprisonment with hard labor for a term of not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than $1,000, or both such fines and imprisonment."

The sixty-second article of war reads as follows:

> All crimes not capital, and all disorders and negligences which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general * * * court-martial, according to the nature of the offense, and punished at the discretion of such court.

The charge in this particular recites "Embezzlement as defined in section 5488, Revised Statutes of the United States, in violation of the sixty-second article of war," and the gist of the specification is that Oberlin M. Carter, captain of engineers, as a disbursing officer, being intrusted with large amounts of public money for river and harbor purposes, did apply for a purpose not prescribed by law certain amounts of the funds so intrusted to him; that is to say, that upon false accounts he withdrew certain moneys of the United

States, illegally from the authorized depository. The statement that the accounts so paid were false, the amounts not being due or owing from the United States to the parties paid, or to anyone, is descriptive of the grounds upon which the accusation of unlawful application is based.

The face of the specification of which the accused officer was convicted clearly avers that he was in the performance of his duty as a disbursing officer. It follows, therefore, that the act committed directly offended against the military state. The specification supports the charge, and taken together clearly aver a military offense. There being power to hear and determine the case, the finding of the court is legal and thus no jurisdictional question arises, and the finding can not be attacked in a collateral proceeding.

The circuit court of appeals, second circuit, in passing upon the very questions herein discussed (see Record, p. 99, folio 1823), says:

> The record presents the charges and specifications upon which he was found guilty of those offenses. The charges describe each offense in the language of the article. Whether the specifications support the charges or the evidence supports the specifications we are not at liberty to answer. When properly constituted and convened a court-martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offenses created by the Articles of War. This jurisdiction necessarily includes the authority to decide when the

> charge against the accused is the commission of one or more of these offenses, whether the specifications and the evidence sufficiently exhibit the incriminating facts.

The court below in disposing of the contention of the petitioner as to the illegality of the findings under the sixty-second article of war, says on page 105, folio 2118, of the record:

> Were the facts set forth in the specification to the fourth charge sufficient to constitute the offense charged, and was the conduct described "to the prejudice of good order and military discipline" as required by the sixty-second article of war? The specification sets forth that Carter was a disbursing officer of the United States, and that as such officer he was intrusted with certain public money which he willfully and knowingly caused to be paid on false accounts, the accounts paid not being due or owing from the United States to the parties to whom the payments were made, of which Carter well knew. In my opinion this charges the application of public money to "a purpose not prescribed by law," and, with the details which the specification supplies, constitutes a sufficient indictment under section 5488, Revised Statutes. And it may also reasonably be contended that in a larger sense the misappropriation by a captain in the Engineer Corps of the Army of public money intrusted to him to be used in the construction of public works of which he has official charge is conduct to the prejudice of good order and military discipline.

In his brief the appellant has not advanced any facts, authorities, or arguments essentially differing from these upon which the foregoing opinion was rendered in the court below.

But in the face of this opinion and of the record in the case, the appellant still alleges in his brief, Point I and its subdivisions, that the findings under the charge are void, the specification being wrongly laid under the sixty-second article of war, because, as he claims, the moneys were applied to a purpose prescribed by law, that the offense charged was wrongly laid under the sixty-second article of war and was not an offense prejudicial to good order and military discipline, it being mentioned in a general article of war, and that the offense was covered by three distinct paragraphs of the sixtieth article of war.

All of these allegations are sought to be developed by the attorney of appellant into a state of facts to support the theory that all of them taken together raised questions jurisdictional in character. But a mere recital of them justifies the assertion that they amount to nothing more than allegations of errors by the court-martial in the exercise of its lawful jurisdiction.

Under these circumstances of the case the appellee is constrained to answer and contest the allegations, etc., made in the brief of the appellant, although in his opinion there is no merit in them.

a. The moneys were not applied to a purpose prescribed by law.

It is claimed by the appellant in his brief (p. 27) that the specification to the fourth charge affirmatively shows that the money mentioned therein was applied to a "purpose" mentioned by the law. He arrives at the peculiar conclusion by reason of the fact that the vouchers upon which the payment was based were marked, the one, "Appropriation for improving harbor of Savannah, Ga.," and the other, "Appropriation for improving Cumberland Sound, Georgia and Florida," and he says: "The necessary inference is that the appropriation was made by act of Congress for the purpose stated by accused on the voucher. If these vouchers were paid on the work done under an act of Congress, and from funds appropriated by such act for such improvements, then it follows they were paid out for a purpose prescribed by law."

This sort of treatment of the question is illegitimate, for it enters into the forbidden domain of retrying the issues before the trial court.

To add to the force of his peculiar assertion, the appellant adds that the matter is not left in doubt because of a certain allegation in this connection made in the petition for the writ of habeas corpus (see appellant's brief, p. 27), which "allegation was nowhere traversed in the return, and this is admitted by the pleadings to be true, and it is true in fact."

The appellant has already shown in the statement of his brief that this contention has no merit whatever

and is contradicted by the record in the case; consequently no further remarks thereon are deemed necessary.

Now, inasmuch as the record in this case, the only matter upon which the court can base its conclusions, namely, the specification to the fourth charge, clearly avers, and the court-martial so finds, that "the accounts on which the same (moneys) were paid being false, the amounts not being due or owing from the United States to the parties paid or to anyone else, and he, the said Captain Carter, well knowing this to be the case," how can it be said in the face of these facts that the payment was prescribed by law? Such an assertion virtually proclaims that an officer disbursing money appropriated by law is by the mere reason of such appropriation justified in applying it to the payment of a voucher which he knows to be false or upon which he has made a false certificate.

The question here raised by the appellant is not jurisdictional in character, but addresses itself to supposed errors or irregularities in the exercise of lawful jurisdiction determining the sufficiency of the pleading in question and the guilt of the accused under it upon the evidence adduced. It is but another attempt under the guise of specious reasoning, with the aid of foreign matter, to convert the writ of habeas corpus into a writ of error.

b. The offense set out in the specification was properly laid under the sixty-second article of war, because it is an offense "to the prejudice of good order and military discipline."

The converse of this proposition is held in a subdivision of Point I in appellant's brief (p. 29).

The article of war provides that "All crimes not capital and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by * * * court-martial * * * and punished at the discretion of the court." (Section 1342, Revised Statutes of the United States, article 62.)

First.—Definition and scope of the sixty-second article of war.

The Articles of War were not designed to be a complete penal code enumerating all the offenses of which officers and soldiers may be guilty. Some of the most common offenses are not specifically mentioned; for instance, officers being absent without leave, making false reports or false statements, or signing false certificates; and no specific article exists for the punishment in time of peace of the numerous offenses laid down in the fifty-eighth article of war, the provisions of which are limited to times of war. But the sixty-second article of war is comprehensive enough to supply this deficiency. In respect to the latter article, writers on military law have said:

> The Articles of War designate many offenses, such as murder, larceny, robbery, burglary,

arson, desertion, bribery, cowardice, drunkenness on duty, sleeping upon a post, disobedience of orders, disorderly conduct in quarters, irreverent conduct in church, profanity, etc. The legislative authority then gathers up the non-enumerated, indefinable offenses of military life and places them under the titles of "conduct unbecoming an officer and a gentleman," and "conduct prejudical to good order and military discipline."

That this is the well-understood purpose and effect of the Articles of War last referred to, all military writers agree. This provision, taken originally from the British military law, was in substance incorporated in our first code of 1775, and has similarly appeared in each subsequent issue of our Articles of War. As will be illustrated in construing its separate terms, its evident purpose was to provide for the trial and punishment of any and all military offenses not expressly made cognizable by courts-martial in the other and more specific articles, and thus to prevent the possibility of a failure of justice in the Army. In practice the greater number of the charges that are preferred against soldiers, and a large proportion of those preferred against officers, are based upon this the "general" article of the code. Wherever the offense committed is one not certainly or fully designated or described in some other particular article, or where, though so designated, no punishment is assigned for its commission, or where it is doubtful under which of the two or more articles the offender should be prosecuted, recourse is had to this comprehensive and serviceable

provision as the authority and foundation for the charges and proceedings. (Win., Mil. Law, vol. 1, p. 1035.)

Its policy is to provide a general remedy for a wrong which had not elsewhere been "provided for." (Sam, Mil. Law, pp. 288, 1816.)

There is scarce any impropriety of conduct or irregularity which an officer or soldier may commit that may not be brought under the seventieth article of war. (Kennedy, Mil. Law, p. 34, 1847.)

(This article is the English article of war from which the present sixty-second of the American articles was taken.)

The seventieth article of war is the most useful of the whole. (Napier, Remarks on Mil. Law, pp. 59, 1837.)

There are many offenses which the soldier and officer may commit and many omissions of which they may be guilty which it would be impossible to distinctly lay down in separate articles of war. * * * Hence it is that this article is resorted to under which the sins of commission and of omission are tried and punished. The punishments are discretionary. (Hough, Pres. in Mil. Law, pp. 270, 1855.)

Not being found in any specific article, but defined in that part of the Revised Statutes relating to official misconduct of disbursing officers of the United States, the offense set out in the fourth charge was properly laid under the sixty-second article of war, for it comes directly under the description of the crimes cognizable under that article, by reason of the fact that it was

arson, desertion, bribery, cowardice, drunkenness on duty, sleeping upon a post, disobedience of orders, disorderly conduct in quarters, irreverent conduct in church, profanity, etc. The legislative authority then gathers up the non-enumerated, indefinable offenses of military life and places them under the titles of "conduct unbecoming an officer and a gentleman," and "conduct prejudical to good order and military discipline."

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Not being found in any specific article, but defined in that part of the Revised Statutes relating to official misconduct of disbursing officers of the United States, the offense set out in the fourth charge was properly laid under the sixty-second article of war, for it comes directly under the description of the crimes cognizable under that article, by reason of the fact that it was

committed while on duty under circumstances directly offending against the government and discipline of the military state. (Man. for Courts-Martial, p. 70; 2d Win. Mil. Law, 1124.)

See also Judge Lacombe's opinion (*supra*) and opinion of circuit court for the district of Kansas in this case (*supra*).

Second.—The Articles of War govern the officer and soldier of the Army at all times.

The officers and soldiers of the United States are at all times and in all places govered by the Articles of War and subject to being tried by courts-martial. (Art. 64, sec. 1342, Rev. Stat.)

The obligations imposed by this article upon military persons follow them wherever they may go in the performance of their duty. (Davis's Mil. Law, 480.)

Every officer upon his appointment subscribes to the Rules and Articles of War. (Art. I, sec. 1342, Rev. Stat.)

By entrance into the military service the citizen becomes a soldier. His relations to the State and public are changed. He acquires a new status, with correlative rights and duties. He can not of his own volition throw off the garments he has once put on. His change of status renders him amenable to military jurisdiction. (*United States* v. *Grimley*, 137 U. S., 147.)

He relinquishes his right to trial by jury and surrenders during his service part of his civil rights.

Third.—The courts-martial, in the absence of positive enactment, are bound to regulate their mode of procedure by the customary military law.

In *Ex parte Henderson* (11 Fed. Cases, 349), partially quoted only in the brief on behalf of the appellant, the court said:

> Courts-martial are lawful tribunals existing by the same authority that other courts exist. Their jurisdiction, it is true, is limited and special, being confined to military persons charged with military offenses. Over such persons charged with offenses defined by military law their jurisdiction is complete. They are, indeed, liable to the controlling authority which the civil courts have at all times exercised of preventing them from exceeding the jurisdiction given to them * * *. In respect to persons subject to their authority and charged with offenses subject to their jurisdiction, the civil courts do not sit as a court of error to review the regularity of their proceedings. Informality, therefore, in the proceedings of courts-martial can not be remedied or inquired into by a civil court. The ground work of the jurisdiction and the extent of the powers of courts-martial are to be found in the articles of war * * *, but these articles do not alone constitute the military code. They are, for the most part, silent on all that related to the procedure of military tribunals to be organized by them. This procedure is founded upon the usage and customs of war, upon the regulations prescribed

> by the President, and upon the authority of Congress and upon old practices in the Army, as to all of which points common law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. It would, therefore, be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the proceedings of courts-martial those rules which are applicable to another and different course of practice. (Lord Denman's Opinion in Re Poe, 5 B. & A., 688.)

Compare also to the same effect the extract from the opinion of Mr. Justice Perry in *Porrett's case*, approvingly quoted by the Supreme Court of the United States in the case of *Smith* v. *Whitney* (116 U. S., 167), to which there was added from Justice Story's statement in delivering the opinion of this court in *Martin* v. *Mott* (12 Wheat., 1935):

> That the law by which courts-martial were bound to execute their duties and regulate their mode of proceedings in the absence of positive enactment was general usage of the military service, or what may not unlikely be called the customary military law.

And the same court further approvingly quoted in *Smith* v. *Whitney* the statement of the court of king's bench that it would be extremely absurd to expect the same precision in a charge brought before a court-martial as was required to support a conviction by a justice of the peace (*In re Poe*, 5 B. & A., 681 and 688).

Congress has prescribed an oath for members of courts-martial, of which the following is a part:

> You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding and the custom of war in like cases. (Art. 84, sec. 1342, Rev. Stat.)

This is clearly a legislative recognition of the binding effect of the general usage in the military service referred to by Mr. Justice Story in his opinion.

Fourth.—It is the province of courts-martial to decide what constitutes conduct to the prejudice of good order and military discipline.

The question whether particular charges against an officer of the Army as "conduct to the prejudice of good order and military discipline" amount to that offense, and the question whether particular acts charged against an officer of the Army as "conduct unbecoming an officer and a gentleman" amount to that offense, are questions to be decided by courts-martial according to the military law by an exercise of their jurisdiction.

Clode's Mil. Law, 19.

Dawkins v. *Rokeby*, 4 Fos. & Fin., 831.

Grant v. *Gould*, 1 H. B., 100.
United States v. *Fletcher*, 148 U. S., 84.
Smith v. *Whitney*, 116 U. S., 178.
Martin v. *Mott*, 12 Wheat., 19.
Dynes v. *Hoover*, 20 How., 65.

In the most recent case upon this question, in which the illegality of conviction was claimed, and sentence by court-martial, under the sixty-second article of war, was sought to be set aside, the Supreme Court of the United States, in the case of *Swaim* v. *United States* (165 U. S., 561), said:

> It is strongly urged that no offense under the sixty-second article of war was shown by the facts, and that the Court of Claims should have so found and have held the sentence void. If this position were well taken, it would throw upon the civil courts the duty of considering all the evidence adduced before the courts-martial and of determining whether the accused was guilty of conduct to the prejudice of good order and military discipline in violation of the Articles of War.
>
> But, as the authorities heretofore cited show, this is the very matter that falls within the province of courts-martial, and in respect to which their conclusions can not be controlled or reviewed by the civil courts. As we said in *Smith* v. *Whitney* (116 U. S., 178), of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more compe-

> tent judges than the courts of common law * * *. Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in a private business.

In *U. S.* v. *Fletcher* (148 U. S., 84) similar observations are found.

In his discussion of this case the attorney of the appellant digresses by asserting that a court-martial was particularly unfit to try this case, the officers by their training and education not being prepared for the intelligent handling of such a case, and the so-called *archaic* procedure of courts-martial comes in for its share of adverse criticism.

It is to be remembered that according to the record the court-martial was presided over by Brigadier-General Otis and that the judge-advocate was Col. T. F. Barr, assistant judge-advocate-general—the former an officer of high standing, who studied and practiced law before his entrance into the Army, and the latter an officer of long service in the legal department of the Army and highly skilled in the profession of law. The remaining members of the court were officers of sterling character and reputation and wide experience. All of them had grown gray in the service of their country.

The code complained of is part of the law of the land and must be followed by the Army and the courts, and, although often amended, has practically been in force for more than a century; it has governed our Army in peace and in war, at home and abroad, in the midst of civilization and on the frontier, in warfare with savages and in the struggles with the trained soldiery of civilized nations. It served its purpose well in the greatest of modern civil wars and formed the rule of conduct for the Union and Confederate forces. It supplies that authority from above and requires that obedience from below which is necessary to "make up the soul of the army—in one word: Discipline." It may be ancient, but it still maintains the wholesome republican principle that although the civilian has become a soldier, he is not therefore absolved from obedience to the civil law of the land, but has taken upon himself a double amenability for his acts—a principle much modified in the new English procedure, never heard of in the Empires of Germany, Austria, and Russia, and not even realized in the so-called republican France.

B. THE CRIME CHARGED IN THE FOURTH CHARGE IS NOT "MENTIONED IN THE FOREGOING ARTICLES OF WAR," AND THEREFORE CHARGED UNDER THE SIXTY-SECOND ARTICLE OF WAR.

It is to be remarked at the outset that the language of the sixty-second article of war is broad enough to warrant the construction of the phrase "though not mentioned in the foregoing articles" as not one of a

restrictive character establishing a prohibitory and mandatory exclusion of those crimes, etc., mentioned from being tried under it, but rather permissive in its scope that all crimes not capital, etc., can be tried under this article, whether embraced "in the foregoing articles" or not. So that if a crime, etc., mentioned in any other article than the sixty-second article, was laid and tried under the latter article no jurisdictional question could arise making the sentence void. Error alone might be claimed.

a. The offense charged under the Sixty-second Article of War is not covered both by paragraph 1 and paragraph 4 of the Sixtieth Article of War.

It is claimed that the facts set out in the specification to the fourth charge are sufficient to bring them under the first and fourth subdivisions of the sixtieth article of war. These subdivisions read that any person in the military service (1) "who makes or causes to be made any claims against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or (2) who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses or procures, or advises the making or use of any writing or other paper, knowing the same to contain any false or fraudulent statement," shall on conviction thereof be punished, etc.

These claims are unfounded, the principal averments in the specfication under consideration being that, as a

disbursing officer of the United States, Oberlin M. Carter did apply to a purpose not authorized by law large sums of money by causing said moneys to be paid out by checks on false accounts, the payment being accomplished or executed by the drawing and delivering of checks which directed the payment to be made of the moneys of the United States. Or in other words, that he withdrew, by means of checks, from the authorized depository moneys for a purpose not authorized by law and applied the same to an unlawful purpose.

The matter of the false accounts is descriptive of the unlawful application; this application itself, coupled with the payment and withdrawal of the funds by checks, being the elements constituting the embezzlement defined in section 5488, Revised Statutes, while, on the other hand, (1) the making, or causing to be made, false claims against the Government, and (2) the making or using of any writing containing any false or fradulent statement for the purposes indicated, are the principal offenses laid down in subdivisions 1 and 4 of the sixtieth article of war; specific acts prohibited and entirely distinct from the prohibited acts, which, in section 5488, Revised Statutes, are constituted and designated as embezzlement.

In examining accusations arising in military procedure it is to be observed that: "The instrument in which a military offense against an accused person is set forth (corresponding to the indictment in criminal procedure) is called the charge. Unlike the indictment, however, the military charge is composed of two

parts, the charge proper in which the particular offense is alleged in general terms, and the specification in which, as its name applies, the facts constituting the offense charged are fully and sufficiently stated. An accusation against an officer or soldier not thus separated in form would be irregular and exceptional in our practice, and until amended would not be accepted as a proper basis for proceedings." (Davis Mil. Law, 69: 1 Win. Mil. Law, 187; Manual for Courts-Martial, 15.)

However inartificial a pleading may be, it will properly be held sufficient as a legal basis for a trial and sentence, provided that the charge and specifications taken together amount to a statement of a military offense, either under a specific article or under the general article, viz, the sixty-second. (Digest Opinions, Judge-Advocate-General, 225.)

A crime, etc., cognizable under the sixty-second article of war, may be charged either by its name simply, or by its name with the additional words, "To the prejudice of good order and military discipline," or as "Violation of the sixty-second article of war." It is immaterial in which form the charge is expressed, provided the specification sets forth facts constituting an act, *prima facie*, prejudicial to good order and military discipline. Whenever the charge and specification taken together make out a statement or an act clearly thus prejudicial, etc., the pleading will be regarded as substantially sufficient under the general article and will constitute a legal basis for conviction and sentence. (Digest, Judge-Advocate-General, p. 72.)

The rules of military practice are elastic. For instance, where a specific offense is charged (i. e., an offense made punishable by an article other than the sixty-second article of war) and the specification does not state facts constituting such specific offense, the pleading will be insufficient as a pleading of that offense. Legal effect may, however, be given to a pleading if the charge and specification taken together amount to an allegation of offense cognizable under the sixty-second article of war.

b. The offense set out in the specifications to charge 4 is not covered by paragraph 9 of Article 60, the money embezzled not being money intended for the military service, and the embezzlement found under the Sixty-second Article of War being an embezzlement different in character and essence from the embezzlement mentioned in the Sixtieth Article of War.

1. *The clause "furnished and intended for the military service of the United States" means supplied and designed for military purposes.*

Subdivision 9 of the sixtieth article of war reads: "Any person in the military service * * * who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of, any ordnance, arms, equipments, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or intended for the military service thereof, shall * * * be punished," etc. * * * And it is asserted by the appellant that this subdivision covers the

embezzlement of moneys appropriated for river and harbor improvements, because these works being carried out by the officers of the Engineer Corps, and the appropriations therefor are to be expended under the direction of the Secretary of War, the moneys, in contemplation of law, must be regarded as having been "furnished or intended for the military service."

In construing this section we must at the outset remember that penal statutes must be strictly construed. The office of the concluding clause, "furnished or intended for the military service," is of a restrictive character and designed to describe unmistakably the purpose for which the property mentioned is designed. This is confirmed by the fact that the same statute is the basis of the fourteenth article for the government of the Navy (sec. 1624, Rev. Stat.), where the concluding clause reads, "furnished and intended for the military or naval service thereof."

Five of the seven specially designated classes of property mentioned in the subdivision of the sixtieth article of war under discussion belong to that class known as military or warlike stores and used for military purposes. Indeed, this purpose is inferable from the very nature of that class of property itself. Coupling this fact with the concluding restrictive clause we can not attach to the word "money" mentioned any other or more extensive meaning than that attaching to the other property. The word "furnished" means "supplied," "provided;" and "intended" signifies "designed," "purposed." The words "military service"

when the article "the" is prefixed thereto become a collective noun, by which the land forces or the Army are frequently designated. Good writers make use of the term the "two services" in speaking of the Army and the Navy.

It follows from what has been said that the restrictive clause "furnished and intended for the military service" must be construed to mean "supplied" and "designed" for military purposes, viz, the Army. Appropriations of money are made for definite objects and purposes, and named and designated accordingly, and this irrespective of the medium or agency through which such objects and purposes are accomplished and the expenditures therefor made.

The fact, therefore, that money appropriated for river and harbor improvements is disbursed by an officer of the Army, and the work supervised by the only skilled engineer force in the service of the Government, does not authorize the conclusion that in contemplation of law these moneys become thereby funds furnished or intended for the military service of the United States.

The appellant contends that the collective noun "the military service" has a meaning equivalent to "the War Department." This is clearly an error, for the Department of War belongs to the civil establishment of the Government. Section 158 of the Revised Statutes of the United States enumerates the Executive Departments of the Government and among them "the Department of War," and section 214 of the

same statutes says: "There shall be at the seat of government an Executive Dpartment to be known as the Department of War, and a Secretary of War, who shall be at the head thereof." The remaining sections of that chapter prescribe the personnel of that Department and the duties pertaining thereto. While through this Department the military affairs of the Government are administered and controlled, the Department itself and its personnel proper do not in any way belong to the military service, or constitute a part of the same.

In the brief on behalf of the appellant many general appropriation acts passed prior to 1860 are cited to show that money for public improvements was appropriated in the act making appropriation for the Army. This was at a period of time when but little attention was paid to the classification of appropriations. If we consult any of the Treasury estimates submitted to Congress, we find that the moneys needed for harbor and river improvements are classed with the appropriations for the civil and not for the military establishment. The same estimate also includes the War Department in "The civil establishment," and the funds for the same are invariably appropriated in the act making appropriations for the civil expenses of the Government.

In concluding this subpoint, attention is invited to the fact that Judge Lacombe, in dismissing the writ of habeas corpus in the case of O. M. Carter, distinctly held that the funds mentioned in the specification to the fourth charge were "not furnished or intended for the military service," and that the offense clearly falls

within the language of section 5488 of the Revised Statutes, and is therefore covered by the sixty-second article of war.

2. Officers of the Army are employed in the public service on duties not relating to the Army; but are, nevertheless, in the eyes of the law, considered on military duty. The money disbursed by them when so employed does not thereby become money furnished and intended for the military service.

The statutes of the United States authorize in many instances the employment of officers of the Army in duties which, when performed by a private citizen, would be a purely civil service, and in the discharge of these duties officers so detailed are required to disburse moneys appropriated for the civil establishment of the Government. The statutes referred to are as follows:

> Section 2062, Revised Statutes. The President may require any military officer of the United States to execute the duties of an Indian agent, and when such duties are required of any military officer he shall perform the same without any other compensation than his actual traveling expenses.

The money appropriated for the Indian service is required to be expended under the direction of the Secretary of the Interior.

Section 4664, Revised Statutes:

> The President shall cause to be detailed from the Engineer Corps of the Army, from time to time, such officers as may be necessary to

superintend the construction and renovation of light-houses.

Sections 4665 and 4666 of the Revised Statutes define the duties of engineer officers detailed under section 4664.

Section 4671, Revised Statutes:

> An officer of the Army or Navy shall be assigned to each district as a light-house inspector, subject to the orders of the Light-House Board. * * *

In the act making appropriations for sundry civil expenses for the Government for the fiscal year ending June 30, 1900, there are $625,000 appropriated for the repair of the light-houses, to be expended under the Treasury Department by engineer officers of the Army. (See 30 Stats., 1074, 1079.)

Under section 1800 the Chief Engineer of the Army is charged with the superintendence of the Washington Aqueduct and all other public works and improvements in the District of Columbia in which the Government is interested.

The commissioner of public buildings is an officer of the engineers who has charge of the disbursements of the funds appropriated for the maintenance of the public grounds about the Executive Mansion, greenhouses, the care, repair, furnishing and lighting of the Executive Mansion, maintenance of the Washington Monument, etc.

See act of Congress making appropriations for sundry civil expenses of the Government, 30 Stats., 1074, 1103, 1104.

Would it not be the height of absurdity to say that the funds appropriated for the Indian service, to be disbursed under the direction of the Secretary of the Interior; or funds appropriated for the Light-House Service, to be disbursed under the direction of the Secretary of the Treasury; or funds appropriated for the maintenance, etc., of the Executive Mansion; or funds appropriated for the Washington Aqueduct, and all other public works and improvements in the District of Columbia, to be disbursed under the War Department, become moneys "furnished and intended for the military service" of the United States by reason of the fact that officers of the Army under the orders of their superiors are charged with the supervision of such works and the expenditure of such moneys?

There is no question as to the organization of the Corps of Engineers of the Army, and the character of the various duties they have been, and are now, charged with, some of which duties if performed by a private citizen, but under the employment of others, would be a purely civil service. Nor is there any question that an officer performing such service is in contemplation of law on duty. It has been held that whatever service a military officer is lawfully ordered by his superior officer to perform is, in the eyes of the law, military duty; though when performed by a private citizen, but under the employment of others, it would be purely a civil service. Service on a detail in the Freedman's Bureau

was held to be a military duty. (*Runkle* v. *United States*, 19 Court Claims, 412.)

3. *Under the Constitution and laws of the United States the appropriations made for river and harbor improvements are for the benefit of commerce and navigation, and not for military or naval purposes; the money so appropriated is therefore furnished and intended for public works in aid of commerce.*

In the Constitution Congress has been given power "To regulate commerce with foreign nations and among the several States. * * * (Article I, section 8, Constitution of the United States.)

In expounding this power the Supreme Court has held that navigation is comprehended in it as an incident thereto. (Cooley's Principles of Constitutional Law, p. 63; *Gibbons* v. *Ogden*, 9 Wheat., 1.)

The power to construct works of river and harbor improvements in the navigable waters of the United States, this court says, is an incident of the power to regulate commerce. (*S. C.* v. *Ga.*, 93 U. S., 4; *Gillman* v. *Philadelphia*, 3 Wall., 713.)

In the execution of this power Congress has repeatedly enacted rules in respect to such improvements and their purposes. Section 231 of the Revised Statutes, taken from resolution No. 76 of July 27, 1868 (15 Stat., 262), provides:

> The Secretary of War shall cause to be prepared and submitted to Congress, in connection with the reports of examinations and surveys of

rivers and harbors hereafter made by order of Congress, full statements of all existing facts tending to show to what extent the general commerce of the country will be promoted by the several works of improvement contemplated by such examinations and surveys, to the end that public moneys shall not be applied excepting where such improvements shall tend to subserve the general commercial and navigation interests of the United States.

That owners, agents, masters, and clerks of vessels arriving at or departing from localities where works of river and harbor improvement are carried on shall furnish, on application of the persons in local charge of the works, a comprehensive statement of vessels, passengers, freight, and tonnage. That every person or persons offending against the provisions of this act shall, for each and every offense, be liable to a fine of one hundred dollars, or imprisonment not exceeding two months, to be enforced in any district court of the United States within whose territorial jurisdiction such offense may have been committed. (Act of February 21, 1891, 26 Stat. L., 766.)

The act of Congress approved August 2, 1882 (22 Stats., 213), provides:

That in every case where surveys are made the report thereon shall embrace such information concerning the commercial importance, present and prospective, of the improvement contemplated thereby, and such general commercial statistics as the Secretary of War may be able to procure.

And section 7 of the act of Congress of July 13, 1892 (27 Stat., 115), prescribes:

> That the preliminary examinations ordered in this act shall be made by the local engineer in charge of the district or an engineer detailed for the purpose; and such local or detailed engineer and the division engineer of the locality shall report to the Chief of Engineers, first, whether in their opinion the harbor or river under examination is worthy of improvement by the General Government, and shall state in such report fully and particularly the facts and reasons on which they base such opinions, including the present and prospective demands of commerce; and, second, if worthy of improvement by the General Government, what it will cost to survey the same with a view of submitting plan and estimate for its improvement; and the Chief Engineer shall submit to the Secretary of War the reports of the local and division engineers, with his views thereon and his opinion of the public necessity or convenience to be subserved by the proposed improvement; and all such reports of preliminary examinations, with such recommendations as he may see proper to make, shall be transmitted by the Secretary of War to the House of Representatives, and are hereby ordered to be printed when made.

In accordance with this legislation, the Chief of Engineers has annually submitted with his report to the Secretary of War the reports of his subordinates. Among them are those of the prisoner, Oberlin M. Carter, late captain of engineers, United States Army.

In his report upon the improvements of Savannah River and Harbor, Georgia, dated July 3, 1890, and addressed to the Chief of Engineers (see Annual Report of Chief Engineers to Secretary of War for 1890, Fifty-first Congress, second session, H. R. Ex. Doc. 1, part 2, vol. 2, p. 1245), Captain Carter submits a revised and enlarged project for this work and states:

> The improvement of the harbor of Savannah has led to a great and rapid increase in the commerce of the port. Existing railroads have extended their lines and made new connections, opening up a much larger territory for the trade of Savannah. A new road (the Savannah, Americus and Montgomery Railway) completed its line to Savannah in May last. Two other roads to terminate at Savannah are in process of construction, and others are still projected. One road increased its rolling stock during the past year by 4,000 cars to handle its increased traffic, and the increase has been proportional on other roads. Still, much freight has been rejected and sent to northerly ports on account of the inability of those roads to handle all that offered. The systems now terminating in Savannah have more than 4,000 miles of track, exclusive of connecting lines. Another means of communication with the interior is the Savannah River, navigable as far as Augusta for boats drawing about 4 feet of water. These avenues of commerce bring to Savannah the cotton, lumber, naval stores, and farm products of large portions of Georgia, South Carolina, Florida, Alabama, Mississippi, and Tennessee,

as well as other classes of through freights from the North and West.

Regular lines of steamers have been established between this port and Boston, New York, Philadelphia, and Baltimore. A large fleet of coasting vessels is also engaged in the Savannah trade. About one-third of the exports are to foreign ports, and in this foreign trade is engaged a large number of foreign steamers and sailing vessels of great draft and tonnage.

STEAMSHIP LINES.

Line.	Savannah to—	Number of steamers	Number of voyages.	Tons freight.
Ocean Steamship Co.	Boston	4	60	77,440
Do	New York and Philadelphia.	10	230	411,654
Merchants and Miners' Transportation Co.	Baltimore	3	70	93,584
Total		17	360	582,678

SHIPPING AND TONNAGE OF THE PORT OF SAVANNAH, JUNE 1, 1889, TO MAY 31, 1899, ENTERING AND OUTWARD BOUND.

	Steam.	Sail.	Total.	Tonnage.
American	758	570	1,328	1,363,880
Foreign	215	472	688	538,568
Total	973	1,042	2,016	1,902,448

Vessels are now limited to a draft of about 21 feet. The three new railroads in process of construction, and the greater facilities for carrying freight adopted by existing roads, will bring to Savannah in the future a greatly increased volume of trade seeking an outlet to coastwise and foreign ports. Light-draft vessels will be unable to handle this trade economically. Past improvement has resulted in increasing the available depth at high water from

about 15 feet to about 21 feet. As stated in last year's report, the annual saving of freight rates alone due to this cause amounts to more than the total sum of money expended by the United States upon the harbor since the close of the civil war. Rates of marine insurance have also been reduced. The increase in the value of exports since 1873, when works of improvement were begun under the existing project, is proportional to the cube of the interest in the depth of water during the same period. If the same proportion should hold till a depth of 26 feet is reached, the value of the exports alone would then be $150,000,000.

This is followed by the cotton statistics of the port of Savannah for the commercial year ending August 31, 1889, and by an abstract of the "Arrivals and clearances of vessels and commerce at Savannah, Ga., from January 1, 1873, to December 31, 1889."

In submitting this report to the Secretary of War, the Chief Engineer remarks:

Respectfully submitted to the Secretary of War.

The plan of improvement under which operations have been carried on up to date provides for the establishment of a channel from Tybee Roads to the city of Savannah practicable at high tide for vessels drawing 22 feet of water, and the widening of the channel of the river opposite the city to 600 feet, of uniform depth with the balance of the channel.

To comply with the provisions of the river and harbor act of August 5, 1886, a survey was

made, under the direction of Col. Q. A. Gilmore, Corps of Engineers, of the "Savannah River, from cross tides above Savannah to the bar, with a view to obtaining 28 feet of water in the channel," and an estimate for the improvement was submitted, amounting to $6,660,000. (Annual Report, Chief of Engineers, 1888, Part II, pp. 1059–1073.) As no action has been taken on this report, and a mean high-water depth of 22 feet being insufficient to accommodate the large and rapidly growing commerce upon the Savannah River, and the project for securing a depth of 28 feet requiring so large an expenditure, I directed Lieutenant Carter to prepare and submit a project with an estimate of the cost of obtaining a channel of 26 feet at high water, and it is in compliance with these instructions that the within project is submitted. It is recommended that the future operations on this river be directed to securing a depth of 26 feet, as within proposed, and that the project be amended in this particular.

THOS. LINCOLN CASEY,
Brig. Gen., Chief of Engineers.

JULY 22, 1890.

The recommendations of the Chief of Engineers in his indorsement are approved.

L. A. GRANT,
Assistant Secretary of War.

In the same executive document, on pages 1422 and 1424, a report of Capt. Oberlin M. Carter to the Chief of Engineers will be found in respect to the Cumberland Sound improvement, the other of the works in connection with which the said Carter was convicted

of crimes. In respect to the object and purpose of this improvement he says:

> All of the commerce of St. Marys, Ga., and 90 per cent of the commerce of Fernandina, Fla., are dependent on water transportation through Cumberland Sound. The trade of Fernandina increases yearly, and in 1889 exceeded that of 1888 by 20 per cent. An estimate based on the first five months of 1890 indicates that the commerce during the present year will be from 30 to 40 per cent greater than that of last year.
>
> The Florida Central and Peninsula Railroad, terminating at Fernandina, besides running through a fertile and well-timbered country, pierces also the Florida phosphate fields, and much of the rock from the phosphate mines will be brought by this road to Fernandina for shipment to foreign and coastwise ports. Anticipating this increased traffic, the railroad is extending its terminal facilities and building new wharves.
>
> Two steamships per week ply between Fernandina and New York, and fifteen steamers per week between Fernandina and local coastwise ports. A large fleet of foreign and coastwise vessels also engage in the commerce of this port.
>
> In 1889 the shipments, foreign and coastwise, amounted to 407,589 tons, valued at $5,000,000, on which the freightage was $1,000,000; and the receipts by water were 43,533 tons, valued at $3,865,000, on which the freightage was $650,000. The number of passengers carried was 4,500.

And this is followed by a table of the amounts and values of the shipments and receipts of articles of commerce by and a table of arrivals and clearances of vessels at Fernandina, Fla., from January 1, 1875, to December 31, 1889, and by similar tables relating to shipping and commerce of St. Marys, Ga.

The annual reports of the Chief of Engineers to the Secretary of War for the years 1891 to 1897, inclusive, contain similar reports from Captain Carter upon these two public works.

Fifty-second Congress, first session, H. R. Ex. Doc. 1, part 3, vol. 2, pp. 1497, 1503, 1504, 1505, 1522, 1523, 1561–1565.

Fifty-second Congress, second session, H. R. Ex. Doc. 1, part 2, vol. 2, pp. 1243, 1245 et seq., 1286, 1288 et seq., 1599.

Fifty-third Congress, second session, H. R. Ex. Doc. 1, part 2, vol. 2, pp. 1542, 1546, 1550, 1552, 1596, 1598, and 1599.

Fifty-third Congress, third session, H. R. Ex. Doc. 1, part 2, vol. 2, pp. 1135, 1136, 1157, 1158, 1160, 1161, 1201–1206.

Fifty-fourth Congress, second session, H. R. Ex. Doc., Vol. II, pp. 1211, 1220, 1221, 1285, 1288, 1289, 1293.

Annual Report of Chief of Engineers, Vol. II, pp. 1493, 1497 et seq., 1526, 1528.

In each of these the purposes of these improvements for the benefit of commerce and navigation are discussed and statistics concerning these objects are submitted in substantiation of the necessity of the improvements. But nowhere in any of the reports

herein referred to, and directly relating to the works set out in the record of this case, can the slightest reference be found as to any connection of these works with the military service or military purposes, or as to their value or bearing upon the military or naval operations in the country. They are purely and simply public works for the benefit of commerce.

The money made the subject of the embezzlement in this case was appropriated—to be expended under the War Department—in the act of Congress of June 3, 1896 (29 Stat., 202–298), entitled, "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes." And in the act of June 4, 1897 (30 Stat., 11 and 44), entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1898, and for other purposes."

The War Department, as has already been shown, is a part of the civil establishment of the Government, and the personnel and property belonging thereto is a part of the civil service, to which all the civilian assistants and the employees of the officers on river and harbor improvement duty belong.

4. *Attorney for appellant has been misled when he states that the Judge-Advocate-General has held that offenses under section 5488, Revised Statutes, are properly chargeable under the sixtieth article of war. No opinions rendered by the Judge-Advocate-General hold that view.*

In support of the claim that the specification to the fourth charge should have been laid under subdivision 9 of the sixtieth article of war, appellant says:

> In the Opinions of the Judge Advocate-General it was expressly held that the withdrawing by a disbursing officer of the Army from an authorized depository of *public funds* for a purpose not prescribed or authorized by law—as for personal use, or to pay claims not due from the United States or payable by such officer—being a form of embezzlement defined by section 5488, Revised Statutes, was properly chargeable under the sixtieth article of war, and conviction of an officer upon such a charge was held authorized and legal. (Digest of Opinions of Judge Advocate-General, p. 57.)

An examination of the opinions in the cases upon which the foregoing statement is based discloses the fact that the compiler made a serious error, for none of the opinions rendered sustain his assertion. To the contrary, the distinction between the character of the general offense of embezzlement and the particular offense of embezzlement defined in the act of June 14, 1866, now section 5488, Revised Statutes, is clearly set out and defined, the difference being so marked

that it would be clearly an error to charge the acts set in the latter statute as a violation of the sixtieth article of war. The opinions referred to were rendered in the following cases, viz:

First Lieut. John F. Skelton, Forty-fifth Infantry, G. C. M. O., No. 43, of 1868.

First Lieut. Thomas W. Shaw, Twenty-eighth Infantry, G. C. M. O., No. 86, of 1868.

First Lieut. Charles Jordan, Sixteenth Infantry, G. C. M. O., No. 27, of 1872.

Maj. Henry B. Reese, paymaster, U. S. A., G. C. M. O., No. 34, of 1872.

Maj. R. P. Runkle, U. S. A., G. C. M. O., No. 7, of 1873.

All of these officers except the last named were tried, among other offenses, for illegally withdrawing from the authorized depositories or applying to a purpose not authorized by law money intrusted to them, and in each of these cases the money so withdrawn or so misapplied was furnished or intended for the military service, but the offenses were charged under the act of June 14, 1866, now section 5488, Revised Statutes, and *not* under what is now subdivision 9 of the sixtieth article of war.

Major Runkle was tried under the act of March 2, 1863, now the sixtieth article of war, for embezzlement, and not for any acts legitimately chargeable under the act of June 14, 1886.

In remarking upon the general offense of embezzlement as then set out in the thirty-ninth article of war of the Articles of 1806, and upon the special embezzle-

ment defined in the act of June 14, 1866, Judge-Advocate-General Holt, in his opinion upon the case of Major Reese, above cited, says:

> * * * The court may well be supposed to have construed the thirty-ninth article as contemplating an embezzlement or misapplication with fraudulent intent, and to have acquitted on the ground that there was, upon the testimony, a reasonable doubt as to the existence of such intent. But if this conclusion be accepted, the fact remains that no such construction could properly govern in connection with the other charge (embezzlement, under the act of June 14, 1866). The statute of 1866, in view of which it was preferred, is the expression of an extreme vigilance in regard to the proper use and disposition of the public moneys, found by the experience of the Government to have become imperatively necessary to be observed. It provides an additional safeguard of the public treasury by enacting that any disbursing officer who shall withdraw, transfer, or apply any of the public funds intrusted to him for any purpose not authorized by law shall be deemed guilty of a felonious embezzlement and be punished accordingly. The intent of the officer, whether innocent or fraudulent, enters in no manner into the statutory offense. If his act of withdrawal, application, etc., of the funds is simply one not authorized by existing law he is guilty of the crime here defined by Congress. His intent, if innocent, may perhaps be considered in mitigation of punishment, but can not be relied upon as a legal bar against conviction.

> The offense created by this act belongs to the class known as *mala prohibita;* but it is upon the repression of this class of offenses that the safety of the public treasury largely depends.

Now, the embezzlement set out in the old thirty-ninth article of war, as well as the embezzlement set out in subdivision 9 of the sixtieth article of war, is the embezzlement in which felonious intent is essential, and the offense itself belongs to the class known as *malum in se.*

In the publication to the Army of the case of Major Reese, the Secretary of War, approving the views of Judge-Advocate-General Holt, said:

> In the opinion of the Secretary of War, they might well have convicted the accused of at least a portion of the charged violations of the act of June 14, 1866 (now sec. 5488, R. S.), a statute enacted for the more complete protection of the Treasury, * * * and which, without regard to the *intent* of the offender, denounces all withdrawals from a public depository or dispositions of public moneys not authorized by express law. (G. C. M. Orders, No. 34, War Dept., Nov. 30, 1872.)

This authoritative ruling, as well as the publication in orders of the trial of similar cases above cited, and the approval of the findings and sentence in each case by the President, entered into the military law and became important precedents for the guidance of courts-martial in similar cases, for military law is made up in part of the orders, published to the Army. (1st Winthrop, 4 and 38.)

As a rule, therefore, acts defined in section 5488, Revised Statutes, have been brought to trial as embezzlement under this section in violation of the sixty-second article of war, and *not* under the sixtieth article of war. In substantiation of this statement, attention is invited, in addition to the cases already cited, to the cases of:

Maj. John McClintock, Thirty-sixth Infantry, published in G. C. M. O., 5, of 1869.

Maj. J. L. Hodge, paymaster, U. S. A., published in G. C. M. O., 21, of 1871.

Capt. T. B. Hunt, A. Q. M., published in G. C. M. O., 18 of 1874.

First Lieut. George B. McDermott, published in G. C. M. O., 58 of 1874.

Maj. V. S. Eggleston, paymaster, published in G. C. M. O., 81 of 1874.

First Lieut. W. M. Fleming, Twelfth Infantry, published in G. C. M. O., 52 of 1877.

Maj. James H. Nelson, paymaster, published in G. C. M. O., 5 of 1881.

Maj. J. W. Wasson, paymaster, published in G. M. C. O., 30 of 1883.

In conclusion it may be asserted that the embezzlement set out in the sixtieth article of war is the ordinary embezzlement, while the specification under the fourth charge sets out a special statutory embezzlement. The distinction between the two is marked. The statute does not require, and the specification does not allege, that the money or property ever came into the possession of the accused and that he converted the same to his own use, but alleges, as the statute requires, that

money of the United States had been diverted from the use to which it was dedicated by the appropriation of Congress. This makes a special statutory offense of embezzlement, distinct and independent of the ordinary offense of embezzlement under the sixtieth article of war, and is "not mentioned in the foregoing articles of war," and the accused, Oberlin M. Carter, under this fourth charge and specification was properly triable and punishable under the sixty-second article of war. This view, urged in the court below, was sanctioned by it, as is shown by its opinion (Record, p. 106, folios 2119, 2120), as follows:

> It is also contended that under the sixty-second article of war no charge can be preferred that is embraced in any other article, and that, as the charge is that of embezzlement, it is covered by either the first, fourth, or ninth paragraph of the sixtieth article of war. Assuming, but not deciding, that no charge can be laid under the sixtieth article of war if it is mentioned in any other article, still it is apparent that the embezzlement defined in section 5488, Revised Statutes, is not the offense denounced in either the first or fourth paragraph referred to, and I am also of the opinion that it is a species of embezzlement distinct from that defined in the ninth paragraph of the sixtieth article of war, since the money which is the subject of embezzlement under the latter article is "money furnished for the military service;" whereas, under section 5488, the term money comprehends any public money, whether appropriated for the military service or for other purposes.

> The offense denounced in section 5488 is much broader and more comprehensive than the other, the former being the application by a disbursing officer of money to any authorized purpose, whilst under the ninth paragraph mentioned the money which is the subject of this embezzlement is money appropriated specifically for the military service, and it is quite probable from the contents of the entire paragraph that the term "embezzlement," as there employed, means such an offense as is generally understood where one having the money of another in his custody appropriates it to his own use with felonious intent, intending to deprive the true owner thereof.

The act of March 3, 1863, from which the sixtieth article of war was taken, was passed while a great war was in progress, and was intended to punish frauds and other offenses against the United States which arose in the gigantic operations of the Government in equipping and supplying its armies. River and harbor improvements were then at a standstill; there was other and more serious work for our corps of engineers than to construct improvements for the benefit of a commerce which was in abeyance on the vast theater of war. It can not, therefore, be said that harbor and river improvements were had in view when Congress passed the act known for many years as the fraud act, and now forming the sixtieth article of war and section 5438 of the Revised Statutes.

POINT III.

The sentence in this case is not in violation of the one hundred and second article of war. The fifth amendment to the Constitution does not apply to trials by courts-martial. Each of the charges upon which the prisoner was convicted is a distinct substantive offense, which was within the province of the court-martial alone to determine as having been violated by the accused, and the sentence imposed is legal.

It has already been remarked that in his specification of errors the appellant has omitted his assignment of error "that the sentence is in violation of the one hundred and second article of war, the accused having been twice punished for the same offense." He now bases his claim of illegal double punishment wholly upon the fifth amendment. He says:

> The sentence is in violation of the fifth amendment of the Constitution. Assuming that it has been demonstrated that the specification under Article of War 62 was wrongly laid thereunder, and that conviction and sentence under charge 4 was beyond the powers of the court-martial, it is now insisted that by the sentence of fine, imprisonment, dismissal, and degradation, Captain Carter has been more than once put in jeopardy for the same offense.

To sustain this contention the attorney of the appellant (appellant's brief, p. 73) again resorts to his peculiar method of manufacturing evidence for the occasion by asserting that the return failing to traverse certain allegations made in the petition for the writ in this case, these allegations must be accepted as true

and should be admitted as evidence in this case in support of the plea of double jeopardy.

Reference is made to the statement in this case where the appellee has shown the error made by this appellant and that in this respect he is contradicted by the record in this case. The particular contention, therefore, on the part of the appellant, may be considered as eliminated.

In the *Esmond case* (5 Mackey's Reports, 73) the supreme court of the District of Columbia (sitting as an appellate court), said, in discussing the eighth section of the first article of the Constitution, and the fourth, fifth, and sixth amendments thereto, as follows:

> These provisions contemplate the establishment by Congress of two distinct systems of jurisdiction for the punishment of crime, and that each should be complete and sufficient. In other words, they import that the power of Congress to make rules for the government of the land and naval forces includes the power to establish institutions for the trial and punishment of crimes committed by persons in the land and naval forces, whose action and judgments shall be as conclusive for all purposes as the action and judgments of any other tribunal can be.
>
> If such tribunals have actually been established, their judgments must be treated precisely as the judgments of the courts of the other system of jurisdiction are treated.
>
> In the light of the Constitutional authority to do so, it is clear to us that Congress has intended by the Articles of War to establish such a system. * * *

In *ex parte Henderson* (11th Fed. Cases, 349), the court said:

> Courts-martial are lawful tribunals existing by the same authority that other courts exist. Their jurisdiction, it is true, is limited and special, being confined to military persons charged with military offenses; over such persons charged with offenses defined by military law their jurisdiction is complete. They are indeed liable to the controlling authority which the civil courts have at all times exercised of preventing them from exceeding the jurisdiction given to them. * * * In respect to persons subject to their authority and charged with offenses subject to their jurisdiction, the civil courts do not sit as a court of error to review the regularity of their proceedings. Informality, therefore, in the proceedings of courts-martial can not be remedied or inquired into by a civil court. The ground work of the jurisdiction and the extension of the powers of courts-martial are to be found in the Articles of War * * * but these articles do not alone constitute the military code. They are, for the most part, silent on all that related to the procedure of military tribunals to be organized by them. This procedure is founded upon the usage and customs of war, upon the regulations prescribed by the President, upon the authority of Congress, and upon old practices in the Army, as to all of which points common-law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. It would, there-

> fore, be most illogical, to say nothing of the impediments to military discipline, which would thereby be interposed to apply to the proceedings of courts-martial those rules which are applicable to another and different course of practice. (Lord Denman's opinion, In re Poe, 5 B, and A688.)

As the two jurisdictions discussed in these two opinions derive their power and practice from different sources, causes arising in each must necessarily be examined and adjudged under the practice and by the law applicable to that jurisdiction under which they arise.

Under the constitutional powers to prescribe rules for the government of the Army, Congress, in the Articles of War, has established the following oath for members of courts-martial:

> You, A B, do swear that you will well and truly try and determine, according to evidence, the matter now before you between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases. (Art. 84, sec. 1342, Rev. Stats.)

The oath makes primarily the Articles of War the rule and guide of courts-martial. If, therefore, a question in the trial of a case arises, it must be decided

under the said articles if it is covered by them. In the case at bar it is claimed by the appellant that under the charges upon which the accused is arraigned and of which he was convicted he has been twice tried and punished for the same offense. The one hundred and second article of war (section 1342, Revised Statutes of the United States) reads as follows:

> No person shall be tried a second time for the same offense.

The court-martial, therefore, under its code had perfect jurisdiction to dispose of any plea that the accused was being tried twice in the same proceeding for the same offense. This being the case, any claim now raised as to having been twice punished under such a proceeding remains a question under the one hundred and second article of war and can not be changed or transferred into a violation of so much of the fifth amendment of the Constitution which reads, "Nor shall any person be subject for the same offense to be put twice in jeopardy of life and limb;" for this prohibition relates to another jurisdiction, viz, the United States courts, established under another power in the Constitution. It requires no argument that courts-martial are not United States courts or parts of the judiciary of the United States. The provisions of the fifth, sixth, and eighth amendments relate to judicial proceedings in courts of the United States.

Barron v. *Mayor of Baltimore*, 7 Peters, 243;
Ex parte Watkins, ib., 573.
Pritchell v. *Commonwealth*, 7 Wall., 326.
Edward v. *Elliott*, 21 ib., 557.

Walter v. *Sauvinett*, 2 Otto, 90.
Parsons v. *Yendall*, 5 ib., 294.
1 Bick Crim. Law, 931, 946.
Dynes v. *Hoover*, 20 Howard, 78, 79.

> Article V, of the amendments, and Articles VI and VII contain * * * provisions concerning trials in the courts of the United States designed as safeguards to the rights of parties. (*In re Biglow*, 113 U. S., 330.)

In ex parte Milligan (4 Wall., 123), Mr. Justice Davis, in speaking for this court, said:

> The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment or presentment, before anyone can be held to answer for high crimes, "except cases arising in the land and naval forces, or in the militia, while in actual service, in time of war or public danger," and the framers of the Constitution doubtless meant to limit the right of trial by jury, in the sixth amendment, to those persons also who were subjected to indictment or presentment in the fifth.
>
> The discipline necessary to the efficiency of the Army and Navy required other and swifter modes of trial than are furnished by the common law courts; and in pursuance of the power conferred by the Constitution, Congress had declared the kinds of trial and the manner in which they shall be conducted, for offenses committed while the party is in the military or

naval service. Everyone connected with these branches of public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by civil courts.

In the same case the Chief Justice said:

It is not denied that the power to make rules for the government of the Army and Navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time. Nor, in our judgment, does the fifth or any other amendment abridge that power. "Cases arising in the land and naval forces, or in the militia, or in actual service in time of war or public danger," are expressly excepted from the fifth amendment: "That no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and it is admitted that the exception applies to other amendments as well as to the fifth.

Now, we understand the exception to have the same import and effect as if the powers of Congress in relation to the government of the Army and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The States most jealous of the encroachment upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval

forces. Thus Massachusetts proposed "that no person shall be tried for any crime by which he would incur an infamous punishment or loss of life until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land forces." The exception in similar amendments proposed by New York, Maryland, and Virginia was in the same equivalent terms. The amendments proposed by the States were considered by the first Congress, and such as were approved in substance were put in form and proposed by that body to the States. Among those thus proposed and subsequently ratified was that which now stands as the fifth amendment of the Constitution. We can not doubt that this amendment was intended to have the same force and effect as the amendment proposed by the States. We can not agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by the action of the State conventions.

We think, therefore, that the power of Congress in the government of the land and naval forces and of the militia is not at all affected by the fifth or any other amendment. (4 Wall., 142.)

Although the opinion of the court in this case is not so explicit in its language as that of the minority in stating that the government of the land and naval forces is not affected by the amendments, this would seem to have been in Mr. Justice Davis's mind also. The separateness of the jurisdictions was evidently before him when he said that the discipline of the Army and Navy

required other and swifter methods of trial than are furnished by the common-law courts, and therefore, Congress, in pursuance of the powers conferred by the Constitution, had declared the kinds of trial, and the manner in which they should be conducted, for offenses committed by persons in the military and naval service—that is, offenses against these jurisdictions, for, except in so far as the person who enters either service thereby assumes new obligations, his obligations existing before his entry into the service remain in force, modified, however, to some extent, by his new status.

While there was in this case no direct issue as to the applicability of the amendments to cases of persons regularly enlisted or commissioned in the land or naval forces, yet enough appears in the majority and minority opinions as to the general scope, force, and effect of these amendments to justify the conclusion that if that issue had been before the court it would have held that the amendments do not apply to the cases of officers and soldiers in the military service when tried under the Articles of War.

It may also be said that it requires no argument that the Articles of War and the regulations of the President to carry them into effect are inconsistent with the provisions of the amendments of the Constitution and deprive the officers and soldiers in their military status of rights guaranteed to citizens by the Constitution. For the efficiency of the Army and the purposes for which it has been created this must be so. A cursory glance at the Articles of War and Army Regulations shows that the nineteenth article of war

abridges the right of freedom of speech as this right is defined by text writers on constitutional law; that the sixty-fifth article of war and military procedure generally is inconsistent with the provisions of the fourth amendment of the Constitution; that the ninety-first article of war and military procedure under it require, in cases not capital, the taking of depositions of witnesses residing beyond the limits of the State, etc., in which the military court is in session, and authorizes the reading in evidence of such deposition, which is clearly antagonistic to the sixth amendment, which grants every person the right "to be confronted with the witnesses against him;" and further, that the twenty-ninth and thirtieth articles of war abridge, if not totally deny, the officers and soldiers the right to assemble and petition the Government for redress of grievances, so granted in the first amendment, as defined by text writers on constitutional law.

These restrictions and deprivations of constitutional rights have principally their origin in the Articles of War of 1776, subsequently revised and reframed by a committee consisting of John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R. R. Livingston. After the adoption of the Constitution these articles were continued in force by the First Congress of the United States on September 29, 1789, and have come down to us with modifications and revisions in 1806 and 1874.

That the soldier in his military status must forfeit such of his civil rights as interfere with the government and regulation of the army was recognized in England

by the late Sir Robert Peel while in office. He remarked: "It would be utterly impossible to maintain discipline if soldiers were allowed to be political partisans, correspondents for newspapers, or members of political clubs. Then, indeed, a standing army would be in truth a curse; then might they bid farewell to civil liberty."

He thought, therefore, "that it was fully in the power of the commanding officer to interdict soldiers communicating with the newspapers and to prevent them from being members of a political union." He denied the truth of the doctrine that a soldier continues to enjoy all the rights of the citizen. "It was clear that he must forfeit that portion of his civil rights which would interfere with the discipline of the army."

Acting upon the principle enunciated by this great statesman a general order was put forth by the commander in chief under date of August 3, 1835, requiring the officers and men to withdraw their attendance from Orange and other political assemblies under the penalty of being tried and punished by courts-martial for their disobedience. (1 Clode's Mil. Forces of the Crown, 161.)

Military law is the specific law which governs the Army as a separate community alike in peace and in war.

By entering this community the citizen becomes a soldier. His relations to the State and to the public have changed. He acquires a new status with correlative rights and duties, this court says in the *Grimley case* (*supra*). He

waives in some particulars his rights as a citizen, surrenders his personal liberty during the existence of his new status, and consents to come and go at the will of his superior officers. He agrees to relinquish his right to trial by jury, to be disciplined for offenses unknown to the civil law (*United States* v. *Clark*, 31 Fed. Rep., 713). The very nature of this community makes it evident that it can not be governed by the code of laws which applies to the great body of citizens. Military exigencies require not individual liberty but subordination, obedience. The very rules which are found to protect the individual rights of the people would destroy discipline. A celebrated general of modern times has remarked that "an army without discipline is always costly, in war useless, and in peace dangerous."

It is to be remarked there is nothing in the record of the court below to show that the trial court refused to sustain a plea of the accused that he was being twice tried for the same offense in the same proceeding, in violation of the one hundred and second article of war or the fifth amendment. As a matter of fact no such plea was made, and this is shown by the general court-martial orders, part of the record in this case.

It is a general rule that such a plea as described is a defense which must be raised at the trial, and can not be made the ground of an application for a writ of habeas corpus. (15 Ency. of Law, 169; *Ex parte Bigelow*, 113 U. S., 328; *Ex parte Ulrich*, 43 Fed. Rep., 661.)

This plea was waived when the accused pleaded to the general issue.

Supposing, now, as a matter of illustration, that the accused had in the trial court pleaded in bar of trial the one hundred and second article of war, and the court-martial had decided the plea to be invalid, the circuit court below would have had to hold that that decision was valid and binding because the court-martial had jurisdiction. (See Esmond's Case, 5 Mackey's Reports, 73.)

But if the court-martial had decided that the plea was valid, and had, nevertheless, gone on and tried and sentenced him for the offense involved in the plea, the court below on writ of habeas corpus would have undoubtedly discharged him on the ground that the court-martial had no jurisdiction to try him twice for the same offense. This, not because of the provisions in the fifth amendment relating to former jeopardy, but because the one hundred and second article of war provides that "no person shall be tried a second time for the same offense."

Assuming, for the sake of argument, that these two provisions are the same in meaning, nevertheless it is clear that they belong to different systems of law, and each is of force in the sphere of its own system, but without any force or effect at all in the other sphere.

In addition, it is to be remarked that the fifth amendment is the very embodiment of the common law and in its true meaning inapplicable to trials by courts-martial; in the latter tribunals the accused does not call upon his country for deliverance. There is

no jury and there are no judges in the sense in which those terms are known under the common law. The rules under the latter as to when jeopardy attaches are wholly inapplicable to a case before a court-martial. The very enactment of the one hundred and second article of war is proof that the framers thereof did not believe that the fifth amendment in respect to jeopardy applied to trials under the Articles of War.

In the case as supposed in the illustration there would have been no constitutional question raised at all, any more than a plea of *autrefois acquit* in the case of a felony in the circuit court would have raised a question of the meaning and effect of the one hundred and second article of war. The fact that in the case at bar no plea of being twice tried was made in the trial before the court-martial, and was not advanced until the application for the writ of habeas corpus was made to the court below, does not change the force of the argument that no constitutional question was legitimately raised in this case before the circuit court of the United States for the district of Kansas.

A careful examination of the opinion of that court in this case (Record, pp. 102–108, folios 2114–2133) does not disclose that any constitutional question was considered or decided; it simply discusses the meaning of the statutes—the Articles of War—involved and the sufficiency of the charges brought under them. And if thereby inferentially the result was at all reached that the accused was not tried twice for the same offense it was reached under the provisions of the Articles of War and did not involve the fifth amendment.

Neither that amendment nor the one hundred and second article of war was mentioned in that opinion nor even inferentially or remotely referred to either in spirit or substance.

Under the rule laid down by this court in the case of *Cornell* v. *Green* (163 U. S., 79), a case may be said to involve the application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be reviewed on the ground of error in the disposal of such a claim by its decision.

There is no such issue deducible from the record in this case. The assertion that the accused is held in violation of the fifth amendment of the Constitution is an averment of mere conclusions of law, and not a matter of fact supported by the record.

It is respectfully submitted that such an assertion can not be availed of as an assignment of error for the purpose of importing a constitutional question into a cause so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891.

It is claimed in the court below that the accused has been twice and even oftener punished for the same offense, because the overt act in furtherance of the conspiracy under Charge I is based upon two certain payments, which are the same offense of which the accused was found guilty under Charges II, III, and IV. In other words, it is alleged, a single criminal act has been split up into four separate charges.

This is identically the same contention advanced before the circuit court of appeals, second circuit, and before this court in the petition for a writ of certiorari.

This contention is fallacious, both upon the facts and the law, and disregards the apparent fact that under each of the said charges the gist of each offense is separate and distinct.

In other words, the gist of Charge I is a conspiracy to defraud the United States, in violation of article 0 of the Articles of War. The real offense, then, is the unlawful agreement or combination upon the part of the accused with the others mentioned in the specifications, which makes the common-law offense of conspiracy. The unlawful agreement or combination alone would constitute the offense under said article, without requiring any overt act to be set forth to complete the offense, as in the internal-revenue acts of conspiracy to defraud (Rev. Stat., 3169) and other cognate statutes.

It is, therefore, plain that the accused would come within the statute if he had conspired to commit the offense without having performed any act to effectuate the object thereof.

The gist of the offense under Charge II is the causing of false and fraudulent claims to be made against the United States, which would have been complete even though the accused had not conspired with any other persons to effectuate his fraudulent scheme, and was complete when he caused the said claims to be

made and presented, although payment thereof never had been allowed or made.

Under Charge III any conduct unbecoming an officer and a gentleman would be in violation of the sixty-first article of war, so that if the petitioner had been found guilty of any one of the separate offenses provided for under article 60 then it became mandatory upon the court-martial to dismiss him from the service by reason of such acts, and is a separate punishment, not included in the punishment of any of the other articles of war, and follows, as a necessary corollary, his conviction upon any other charges. Judge Lacombe, in the case at bar, says:

> This is a provision only independent of the other definitions of offenses in the statute. The same course of conduct may constitute an offense elsewhere provided for, and also may warrant a finding of guilty under the sixty-first article of war.

The gist of the offense under Charge IV, as defined by section 5488 of the Revised Statutes, is the embezzlement of funds intrusted to the petitioner in his official capacity, and for which character of embezzlement no provision is made specifically in any of the Articles of War.

An examination of the specifications under Charge IV will show that the embezzlement therein set forth is not such an embezzlement as is provided for in any of the subdivisions of article sixty, as the only embezzlement provided for under that article is where the thing or money embezzled was furnished or intended for the

military service of the United States; and, as has been shown in the discussion under Point I of this brief, the moneys so embezzled were not intended for the military service of the United States, but for river and harbor improvements.

So, therefore, the gist of the offense is necessarily different and distinct from those charged under the other article.

Furthermore, the payment of the two separate checks set forth as constituting the embezzlement under Charge IV was not an element necessary to or incorporated as a part of any of the offenses charged under the other articles.

It follows, therefore, that a single criminal act has not been split up into four separate things, but that under the statute the petitioner was guilty of four separate and distinct offenses.

It is respectfully submitted that nothing contained in the decisions in *Ex parte Nielson* (131 U. S., 176) and *Ex parte Lange* (85 U. S., 163) support the contention of the petitioner, or militate against the strength of the above propositions, and are readily distinguished upon the facts and upon the law from the case at bar.

The rule applied by the civil courts of the land, in order to determine whether there has been a double conviction for the same offense, is stated in the case of *Morley* v. *Commonwealth* (108 Mass., 433, 435), which has been approvingly quoted by this court, namely:

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence

> required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if the statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

While under the distinct system of military jurisdiction, established by Congress under the Constitution, the common-law rules governing civil courts are not always applicable to courts-martial, yet we will endeavor to apply the foregoing rules to the case before us. Examining the specifications under charges one, two, and four, and applying the foregoing test to each, it can be confidently asserted that the evidence required to support a conviction of the fourth charge and its specification would not be sufficient to warrant either a conviction of the second charge and its specification or of the first charge and its specification, conviction of the latter requiring evidence, in many respects, of a character foreign to either of the two charges and specifications first named. In view of what has been said heretofore upon the character of these charges and specifications it is not deemed necessary to go into a more detailed comparison. An inspection of the record filed with the return in this case will demonstrate the truth of the statements made.

Now, although the trial and conviction of the accused under the third charge has been hereinbefore justified as a legal and proper proceeding (see opinions of Judge Lacombe and Wallace, *supra*), and not conflicting with the provisions of the one hundred and second article of war, in which it is prescribed that "no person shall be tried a second time for the same offense," it will not be improper to show that to the trial and conviction of the accused under that charge the test set out in the second part of the Morley decision (*supra*) may be applied, namely, that "a single act may be an offense against two statutes, and, if the statute required proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." The specifications under the fourth and third charges are similar in tenor, but the statute under which the third charge is laid requires proof that the act shall be "unbecoming an officer and a gentleman," a fact not required by the statute under which the fourth charge is laid.

From all this it may be safely asserted that not only in the light of military law but also under the rules of the common law, if they were applicable, there is no merit in the claim that the accused has been twice or thrice punished for the same offense. No violation of the one hundred and second article of war has been committed or can be claimed, and no foundation for a constitutional question has been laid, nor could any such question be raised in this case under the Articles of War and the facts.

In their true nature the contentions made in this connection when thoroughly analyzed are merely reproductions in another form of the original contentions made on behalf of the accused that the specifications were defective and improper on account of duplicity, and that the one act of drawing two checks was split up into four separate offenses. These alleged errors should have been brought to the notice of the court-martial which had jurisdiction to pass upon them, but the prisoner proceeded to trial, permitted the court to enter on an investigation of the different specifications, and himself brought forward his defense as to each of them. (See opinion of Attorney-General in the Carter case on September 29, 1899, p. 5.) He can not now in a collateral proceeding ask this court to review the supposed error made by the trial court in the exercise of its lawful jurisdiction.

While it has already been shown that four offenses were not carved out of the alleged single act of drawing two checks, yet it will not be out of place to refer to Judge Wallace's opinion when deciding the appeal upon the original habeas corpus proceedings on behalf of the prisoner. The learned judge said:

> It is also proper to state that Congress can, if it sees fit, carve out two or more offenses from a single criminal transaction, and impose cumulative punishment for the different offenses (*Commonwealth* v. *Trickey*, 95 Mass., 559; *United States* v. *Harmison*, 3 Sawyer, 556), and if the court-martial convicted the relator of several offenses for a single criminal transaction, it did

not transcend necessarily the power conferred by the sixtieth article of war.

The court below, in disposing of this branch of the case, said (Rec., p. 107, folio 2121) as follows:

> Nor is the contention now made that Carter committed but one offense, which has been split up into several charges and punishment inflicted therefor.
>
> "A conspiracy to defraud," as alleged in the first charge, and causing "false and fraudulent claims to be made," as alleged in the second charge, and "the statutory embezzlement under section 5488," as alleged in the fourth charge, are separate and distinct offenses dependent upon different facts and requiring different proof, and therefore it can not be said that for the same act the accused has been tried and punished three times. The mere fact that certain acts of the accused were set out in all of the specifications supporting the three charges does not destroy the distinctive character of the offenses charged.

In the second point of the brief of the appellant it is said that the sentence exceeded the jurisdiction of the court-martial because fine *and* imprisonment were imposed, when the court, as it is claimed, was authorized to punish only in the alternative by fine *or* imprisonment. And in connection therein it is asserted that cumulative punishment for the offenses under the sixtieth article of war is not legal. The *Lange Case* is quoted to sustain this claim.

The *Lange Case* (18 Wall., 166) is explained by the

Supreme Court of the United States in the case of *Ex parte Bigelow* (113 U. S., 328) as follows:

> In that case the petitioner had been tried, convicted, and sentenced for an offense for which he was liable to the alternative punishment of fine *or* imprisonment. The court imposed both. He paid the fine, and made application to the same court by writ of habeas corpus for release, on the ground that he was then entitled to his discharge. The circuit court on this application, instead of releasing the prisoner, set aside its erroneous judgment and sentenced him to further imprisonment. This court held that the prisoner having been tried, convicted, and sentenced for that offense, and having performed the sentence as to fine, the authority of the circuit court over the case was at an end, and the subsequent proceedings were void.

It must be remarked that there was a conviction for but one offense in the case quoted, and the want of jurisdiction to impose the second sentence was apparent upon the face of the proceedings, and hence the discharge of the prisoner under the writ.

In the case at bar there are convictions of four separate statutory offenses, the penalty clauses thereunder furnishing ample and sufficient legal warrant for the sentence imposed. The Lange case is, therefore, of no value in either determining the validity of the sentence in this case or in elucidating the question of cumulative punishment.

The accused was convicted of two separate and distinct offenses under the sixtieth article of war. This,

it will be shown, is in itself sufficient legal warrant for the imposition of fine *and* imprisonment in the sentence

In connection therewith it will be necessary at the outset to refer to the procedure of military costs.

In the procedure of courts-martial all the charges pending against an accused are disposed of in one proceeding and the punishment upon all the convictions adjudged in a single sentence.

The practice of courts-martial in respect to trials for distinct offenses is well stated in the opinion of Attorney-General Griggs, reviewing the court-martial proceedings in the case at bar, dated September 29, 1899, as follows:

> It is laid down in works on military law that care should be taken that all the charges and specifications to which the party may be subject be preferred together. Unlike the ordinary criminal procedure, where but one indictment, setting forth (in one or more counts) a single offense or connected criminal transaction, is in general brought to trial at one time, the military usage and procedure permit of an indefinite number of offenses being charged and adjudicated together in one and the same proceeding. And with a view to the summary and final action so important in military cases, whenever an officer or soldier has been apparently guilty of several or many offenses, whether of a similar character or distinct in their nature, charges and specifications covering them all should, if practicable, be preferred together and together

brought to trial. (I Winthrop Mil. Law, 219, 2d ed.)

This practice appears to have been followed uniformly in court-martial proceedings, especially during the late civil war. An instance is cited where in one case sixty-one different acts of offense were grouped together in one proceeding (see the case of Maj. Justus McKinstry, quartermaster, U. S. A., published in General Orders 43, War Department, 1863). It is not necessary to discuss whether this practice is wise or whether it is prejudicial to the rights of the accused. It appears to be established by long-continued practice, and, so far as I am able on investigation to discover, without previous challenge.

From this practice it naturally followed that upon the completion of the hearing and after coming to a finding upon the various charges and specifications, courts-martial proceed to impose a sentence, not in specific terms upon each separate offense of which the accused has been found guilty, but upon the whole conviction.

In respect to this practice text writers have observed:

> In the absence of any statutory direction upon the subject, usage has established that the sentence of court-martial shall be, in every case, an entirety; that is to say, that there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offenses found, and however different may be

> the punishment called for by the offense. (1 Winthrop, 614, 2d ed.; Benet, 5th ed., 63; Davis, Mil. Law, 148 et seq., 687.)

In the Digest of Opinions of the the Judge-Advocate-General, page 696, it is stated:

> A punishment adjudged upon conviction of the accused on several charges is valid and operative provided it is a punishment legally imposed, upon conviction of any one of the charges on which the conviction is duly approved.

The sentence in this case has for its basis the penalty clauses of the sixtieth, sixty-first, sixty-second, ninety-seventh, and one hundredth articles of war.

So much of the sentence as imposed fine and imprisonment is covered by the convictions under the first and second charges, irrespective of the conviction under the fourth charge.

It must be observed that the prisoner was convicted under the first two charges, laid respectively under the third and first subdivisions of the sixtieth article of war, each supported by a specification reciting separate and distinct circumstances and offenses. One states facts covering the offense "Conspiring to defraud the United States," and the other recites the circumstances of the offense of "Causing false and fraudulent claims to be made against the Government." Neither of these specifications can be considered as a different statement of the same offense, nor as a different count of the same act; they recite distinct and substantive offenses.

From this state of facts, and from the disjunctive character of the offenses set out in the sixtieth article of war, section 1342, Revised Statutes, it follows that the penalty clause of that article must be considered as applying to each offense separately. A sentence, therefore, of fine for one of the offenses and imprisonment for the other, or of fine and dismissal, or of dismissal and imprisonment, can not be legally questioned, and will be valid. We have, therefore, irrespective of the finding under the sixty-second article of war, a legal basis for a sentence of imprisonment. But this, it is said on behalf of the petitioner, would be imposing a cumulative punishment, which it is claimed is illegal.

There is no merit in this contention, for under military practice and the regulations prescribed by the President so-called cumulative punishment has been always recognized. (See Manual for Courts-martial, p. 45 et seq.; p. 52, art. 4.)

For support in this matter we may refer to the practice of the courts of the land, and more particularly to that of the criminal courts of the United States. Mr. Bishop says:

> The object of permitting several distinct offenses to be charged in the same indictment by means of separate counts is to avert from both parties the burden of two or more trials by permitting them to be tried together. (1st Bishop, C. L., 422.)
>
> When this has been done, i. e., the single trial had, the purpose of the practice is accomplished,

and the court may proceed to sentence as if the defendant had a separate trial for each offense. If then the office of the multiple counts in an indictment is, as a matter of fact, to charge more than one distinct offense, there may be a separate sentence for each offense charged and on which the defendant is convicted, each sentence based upon its corresponding count or counts. (21 Am. and Engl. Ency. Law, 1080, and authorities there cited.)

When there is a series of counts, all good, on which there have been separate verdicts, the court trying the case can impose a separate sentence on each count. That this can be done we have numerous authoritative rulings. (Wharton's Crim. Pl. and Prec., 910, 911, and note 5; 1 Bish. Crim. Law, 1060 and 1062.)

In the case of *United States* v. *Bennett* (17 Blatchford, 361), the indictment charged in different counts different offenses, five under section 5431 and one under section 5434, Revised Statutes. Judge Benedict, in speaking for the United States circuit court for the second district, held:

It is contended that judgment must be arrested because the indictment charges different offenses for which different punishments are prescribed by statutes, and Tweed's case is cited in support of the objection. An examination of the doctrine declared in that case would be out of place here, because the prosecution is instituted under statute of the United States which permits the joinder of different and separate offenses in one indictment in separate counts. * * * No difficulty in regard to

> the judgment to be entered arises from the difference between sections 5431 and 5434, Revised Statutes, in respect to the punishment prescribed. The prisoner has been convicted of the several offenses charged in the indictment. Each count, charging a separate and distinct offense, is, in legal effect, a separate indictment, and a conviction thereon may be followed by sentence imposing such punishment as the statute has prescribed for that offense. The statute in permitting the joinder of different offenses in a single indictment, and even the consolidation of two or more indictments, by necessary implication authorize a separate punishment for each offense proved. Otherwise a conviction of offenses permitted to be joined would be the same in effect as an acquittal.

In this connection and in support of this doctrine the cases of *Ex parte Hibbs* (26 Fed. Rep., 421), and *In re Haynes* (30 Fed. Rep., 764), may also be cited.

In re Geo. Fry (3 Mackey, 138), habeas corpus proceedings before the supreme court of the District of Columbia, the question of cumulative sentences was in issue. Justice Cox, in speaking for the court, said:

> Another point is, whether the justice below has a right to impose cumulative sentences. Here were six informations and six convictions, and each imprisonment under the first was to commence on the expiration of the preceding one, making altogether about three years. It has been held, and was particularly held in the Tweed case, so well known in New York, that where similar offenses are charged in different counts of the indictment and punishment, each

one by confinement in the penitentiary, all the periods of punishment by imprisonment must run concurrently; that it amounts to only one sentence, no matter how numerous the charges; that is, if a man steals a pair of shoes one day, the next day another, and a dozen different offenses are committed, he can not be punished by more than one term of imprisonment for the whole any more than in one case. That doctrine in the Tweed case is repudiated both in England and in this country by the weight of authority, and we are satisfied that the distinct offenses, although of similar character, are set forth in several counts in the same indictment, and, *a fortiori*, if set forth in different indictments or informations, it is in the power of the court to impose cumulative sentences; that is, periods of confinement, each one independent of the other.

In *Ex parte W. F. Peters* (4 Dill, 169), the prisoner was convicted in the United States district court upon four counts in one indictment, setting forth at least two different offenses of a similar character under sections 5469 and 5478 Revised Statutes. He was sentenced to two years' imprisonment on each count, commencing on the expiration of each preceding term. Before the expiration of four years he applied to be discharged on habeas corpus, on the ground that the court had no authority to render cumulative judgments. It was held by Judge Dillon that the judgment of the court when collaterally assailed was not wholly void and was good to the extent of four years' imprisonment at least, and the prisoner was, therefore, remanded. The

question as to the validity of the remainder of the sentence was expressed reserved until it should be presented after four years' imprisonment had expired. After expiration of this period the petitioner renewed his application for discharge upon the writ of habeas corpus and the case came up before Circuit Judge McCreary (see 12 Fed. Rep., p. 62).

The court upheld the conviction and sentences and denied the petitioner's application for release.

In *United States* v. *Callahan* (5 McLean, 596), the court, in discussing the question of joining offenses in the same indictment, remarked:

> It must be admitted, when offenses of the same class may be charged in the same indictment, committed at different times and under different circumstances, that the punishment appropriated to each must be inflicted.

In *Ex parte Hibbs* (26 Fed. Rep., 427) the court held:

> In the case of two distinct offenses arising out of two distinct acts or transactions, however closely related in point of time or place, the trial is for the distinct offenses of which the defendant may be found guilty and receive the maximum for each.

In the case of *Howard* v. *United States*, the circuit court of appeals of the sixth district (75 Fed. Rep., 906) said:

> It is also a recognized method of procedure to consolidate separate indictments and try them at the same time as one case; and it is

not an uncommon thing that the same defendant is convicted of more than one offense at the same term upon separate indictments and trials. And the rule which denies the court the power to impose cumulative sentences turns the trial and conviction on all the indictments, except one, into an idle ceremony. It is hardly necessary to say that a rule which leads to such results as these is unsound in principle and can be supported by no consistent process of reasoning. Under such a doctrine a defendant convicted of two or a dozen crimes would suffer no greater punishment than a person convicted of one offense, except such difference as the statutory maximum or minimum limits on the sentences might justify. Such a rule finds no justification in law or morals. The other cumbersome and uncertain methods suggested for dealing with the subject would, in effect, result in complete failure.

Counsel for the petitioner relies with confidence on *People ex rel. Tweed* v. *Liscomb* (Tweed case), 60 New York, 559, and authorities therein cited. The doctrine in this case, however, has met with universal disapproval. Mr. Bishop speaks of it as "a doctrine elsewhere never heard of before and generally rejected since. * * * We think the power thus to pronounce cumulative sentences exists in regard to felonies as well as to misdemeanors, although in the case at bar we are dealing with the misdemeanor grade of offense only."

In the case of *Carlton* v. *Commonwealth* (5 Met., 532), it was held that where there are more than one count

in an indictment the verdict and the sentence may be separate and distinct as to each offense, yet where there is a general finding by the jury of "guilty," a single sentence may be imposed if it does not exceed the sum of the several sentences set forth in the separate counts of the indictment.

The sentence of the court-martial in this case is valid and operative, because the punishments were legally imposable upon the convictions as approved, viz:

1. Fine, under { either Charge I or Charge II, } Art. 60, sec. 1342, Rev. Stat.
2. Imprisonment, under { either Charge I or Charge II, } Art. 60, sec. 1342, Rev. Stat.
3. Dismissal, under Charge III, article 61, section 1342, Revised Statutes.
4. Fine, imprisonment, and dismissal, under Charge IV, articles 62 and 97, section 1342, Revised Statutes.
5. Publication of offense, etc., under Charge III, and article of war 100, section 1342, Revised Statutes.

The respondent desires to invite the attention of the court particularly to the opinion of Judge Wallace, rendered in the former proceedings, on behalf of Oberlin M. Carter, when they came before the circuit court of appeals, second circuit. In it the learned judge fully sustained the views and authorities advanced by the respondent in the foregoing point, that the penalty clauses of the charges of which the prisoner was convicted amply sustain the sentence imposed.

The opinion in question is as follows:

> It is not contended for the appellant that the court-martial did not have jurisdiction of the person of the accused and of the offenses of which he was convicted; but it is insisted that

the court transcended its power in the imposition of punishment. More specifically the contention for the appellant is that, while it was within the competency of the court-martial to try and punish the relator for the offenses in violation of the sixtieth article of war, of which he was convicted, the court exceeded its authority when it punished him by fine and imprisonment instead of fine or imprisonment; and that the conviction and sentence for the offense alleged to be in violation of the sixty-second article of war were void, because the facts charged did not constitute an offense against that article.

If the sentence was in excess of the authority conferred upon the court by the Articles of War enacted by Congress, it was to that extent void, as the court would have gone beyond its jurisdiction in imposing punishment. On the other hand, if the authority of the court extended to the punishment of the relator by fine and imprisonment upon his conviction of the two offenses in violation of the sixtieth article of war, the sentence defeats any remedy by the writ of habeas corpus, as that remedy reaches only cases of unlawful imprisonment, and it matters not for present purposes whether the authority of the court extended to his conviction and sentence for any other offense. There being no statutory direction upon the subject, usage permits an indefinite number of offenses to be adjudicated together in one proceeding by courts-martial, and the rendition of a single sentence covering all the convictions and imposing punishment accordingly, however separate and distinct may be the different offenses

and however different may be the punishment prescribed for them. (I Winthrop, Military Law, 2d ed. (219, 614); Davis, Military Law, 148, 689.)

It follows that if the sentence is warranted by a conviction of two offenses, it is justified to the extent that such offenses are punishable.

The sixtieth article of war declares, among other things, that a person in the military service of the United States "who enters into any agreement or conspiracy to defraud the United States by obtaining or aiding others to obtain the allowance of any false or fraudulent claim," or "who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false and fraudulent," * * * "shall on conviction thereof be punished by fine or imprisonment or by such other punishment as a court-martial may judge." The article, besides the two offenses mentioned, defines disjunctively eight others, and the language prescribing the punishment is contained in a concluding clause at the end of the enumeration. We entertain no doubt that the concluding clause is to be read distributively and applies to each of the ten enumerated offenses, and that a person convicted of two or more of the ten offenses is by its terms punishable for each by fine or by imprisonment or by such other punishment as the court-martial may adjudge. Any other construction would attribute to Congress the intention to ignore any distinction between degrees of guilt in punishing crime and to subject a person guilty of one

offense to the same measurement of punishment as one guilty of several or all of the ten offenses.

* * * * *

It is proper to state that the other punishments imposed upon the relator by the sentence were authorized by the Articles of War. The conviction of conduct unbecoming an officer and gentleman was for an offense in violation of article 61, and that article requires that upon conviction the officer be dismissed from the service. The punishment by publication of his crime was authorized by article 100, which provides for such punishment when an officer is dismissed from the service for cause. It is also proper to state that Congress can if it sees fit carve out two or more offenses from a single criminal transaction and impose cumulative punishment for the different offenses (*Commonwealth* v. *Trickey*, 95 Mass., 559; *United States* v. *Harmison*, 3 Sawyer, 556), and if the court-martial convicted the relator of several offenses for a single criminal transaction it did not transcend necessarily the power conferred by the sixtieth article of war.

In dismissing the writ the court below expressed the opinion that the relator was properly convicted by the court-martial of an offense in violation of the sixty-second article of war, and that the sentence of imprisonment was supported by such conviction. Without intending to impugn the correctness of this conclusion, we have not considered the question because in the view we have reached it does not arise. The relator was lawfully restrained of his liberty by

the sentence and commitment pursuant to it, because the sentence was warranted both as to fine and imprisonment by his conviction of one offense subjecting him to punishment by fine and of another subjecting him to punishment by imprisonment, and both in violation of the sixtieth article of war.

The court below said (Record, p. 107, folio 2120):

> * * * The sentence imposed may be upheld on the conviction under the fourth charge alone, since the punishment authorized by the sixty-second article of war is left to the discretion of the court subject to the review of the President. But the decision need not be based upon the regularity of the conviction on the fourth charge alone. There was also a conviction under the first charge for a conspiracy to defraud the United States and a conviction under the second charge for causing false and fraudulent claims to be made, such charges being the subjects of the first and third paragraphs of the sixtieth article of war. I am in entire accord with Judge Wallace, who delivered the opinion of the circuit court of appeals for the second circuit, that under the sixtieth article of war it was competent to impose a fine for one charge of which the accused was found guilty and imprisonment for the other. Therefore, the entire sentence as ultimately pronounced and confirmed can be sustained under the sixtieth article of war without reference to the sixty-second, and for that reason no relief is possible by the suit of habeas corpus.

In the concluding portion of the argument and brief of the appellant upon the questions in this point he says:

> There is just another aspect of this sentence. If the court was without jurisdiction to sentence under Charge IV, as I have herein above shown, then is the penitentiary portion of the sentence utterly void, because of the addition to the phrase "hard labor." The sixtieth article of war provides only for imprisonment, which means at some military garrison and not at any penitentiary. The *Pridgeon case* (163 U. S., 48) is, therefore, not in point.

The "imprisonment" mentioned in the sixtieth article of war is not restricted to confinement at a military post; to the contrary, when the prisoner so sentenced is also sentenced to dishonorable discharge or dismissal the imprisonment decreed is, by regulation of the Army and the statutes, to be suffered in a penitentiary under the limits presented in the ninety-seventh article of war.

The sentence in this case of imprisonment at hard labor in a penitentiary is based upon the ninety-seventh article of war, under the provisions of which a person can be punished by imprisonment in a penitentiary when the offense of which he is convicted will by some statute of the United States subject such convict to such punishment.

Confinement at hard labor in a penitentiary is sanctioned by the penalty clause of section 5488 and section 5438, Revised Statutes, in conjunction with

section 5542, Revised Statutes of the United States; and further, the act of Congress approved March 31, 1895 (28 Stat., 957), admits of the imprisonment and of their employment at hard labor in Fort Leavenworth Penitentiary of prisoners sentenced by court-martial to imprisonment of more than one year.

This statement of the case, coupled with the rule laid down in the Pridgeon case in this court (153 U. S., 48) on the question of "hard labor," shows sufficient authority for the legality of the sentence in this particular, irrespective of the conviction under the sixty-second article of war. (See also Digest of Opinions of Judge-Advocate-General, Ed. 1901, par. 1469.)

POINT IV.

The sentence in this case has been approved by the President, as required by the statute governing this action, and its legality has been confirmed by three courts of the United States. The action of the President upon some of the findings has no bearing upon the legality of the sentence as long as sufficient findings remain to give validity and effect to the sentence. This is in accord with the well-established practice in respect to courts-martial sentences.

In the third point of appellant's brief it is claimed that the "sentence is illegal and void; because the President having disapproved the finding of conviction by court-martial as to certain offenses, or that there was a failure of proof as to them, then having ordered the original sentence to stand, such sentence ceased to be the sentence of the court."

The court-martial for the trial of Capt. Oberlin M. Carter was instituted in orders issued by direction of the President. He became, therefore, the reviewing officer of the record of the court-martial in this case.

On page 5 of his opinion upon this case, addressed to the President, the *Attorney-General* of the United States, on September 29, 1899, remarked upon the matter of the disapproval of findings by the reviewing authority as follows:

> The grounds upon which the authority to disapprove a finding of a court-martial may be properly exercised are very satisfactorily stated by Colonel Winthrop in his treatise on military law, volume 1, page 640. He states that these grounds are mainly of two classes—
>
> Some going to the legal validity or to the regularity of the proceedings and others to the justice or expediency of allowing the judgment to stand or the sentence or punishment to be enforced. Thus where the court was not legally constituted or composed; or was without jurisdiction or the offense or the offender; or proceeded with the trial when below the minimum of members; or where the record discloses irregularities which, though not amounting to fatal defects, are of a gross character; or where the accused has been denied material testimony or otherwise prejudiced in his defense; or the findings or a part of them are unwarranted by the testimony; or the sentence itself is inadequate to the offense, or too severe or quite unmerited, or imposes a punishment not authorized by law—in any such case the reviewing

officer may, in his discretion, withhold his approval from and formally *disapprove* the sentence, in whole or in part, as the law or facts may require or render proper. His discretion, indeed, is here without restriction; its exercise does not depend upon the quality of his reasons, whether or not *any* reasons are stated by him or whether his actual reasons are in point of fact good or sufficient or the reverse, the disapproval is equally effective in law. At the same time he will, of course, not properly disapprove without good reason—without better reason than the court had for the action which he fails to approve. Where, for example, the evidence in the case was conflicting, and it is apparent that the court, having the witnesses before it, must have been the best judge of their relative credibility and of the weight of the testimony, it will, in general, be wiser for the reviewing officer to defer to rather than disapprove its conclusion. Nor will he properly disapprove a sentence on account of a mere error on the part of the court which does not affect the merits or impair the final judgment—as, for instance, an improper rejection of testimony offered by the defense which, however, would have added to the case no material facts.

He then gives his conclusions as to certain enumerated specifications, and says that he is of the opinion that the evidence fails to show satisfactorily fraudulent knowledge and purpose on the part of Captain Carter, and that he should, on that ground, have been acquitted on the said charges. And he therefore *recom-*

mends that the findings of the court-martial as to these particular specifications be disapproved, adding, however, that he is "led to the conclusion that the court-martial was justified in its findings of guilty upon the charges and specifications relating to the contracts of September, 1896, and that the findings and sentence of the court with respect thereto be approved." All these *recommendations* were favorably acted upon by the President as appears from General Orders, No. 172, of 1899, now before this court.

In regard to the reviewing officers' action under the one hundred and fourth article of war, as it read prior to its amendment in the act of July 27, 1892, Colonel Winthrop, in his treatise on Military Law, first edition, volume 1, page 635, says:

> It could not have been designed in the present article to make the approval of the entire proceedings of the court an essential to the legal execution of the sentence, since the reviewing officer might well disapprove as erroneous or ill-judged some interlocutory ruling not affecting the final conclusion, or some *portion of the findings*, or some one or more of several punishments awarded, while *yet properly and legally approving a sentence*, or a punishment or punishments embraced therein. The term "whole proceedings" must, therefore, be construed as meaning material proceedings, i. e., such as are material to the legal enforcement of the sentence as in fact approved.

Ives in his treatise on Military Law, page 183, also holds in effect that, although the reviewing officer has

disapproved the findings to one or more charges and approved others, he may, nevertheless, approve the sentence and direct its execution provided it is sustained and appropriate to the offenses under the approved charges.

The practice which has prevailed in this respect for a long period is also well illustrated in the Digest of the Opinions of the Judge-Advocate-General, edition of 1895, in paragraph 5, page 696, as follows:

> A sentence, to be valid must, of course, rest upon an approved finding of guilty of an offense for which the accused has been tried. Thus, a duly approved finding of guilty on one of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence although the similar findings and all the other charges are disapproved as not warranted by the testimony.

In an opinion dated October 24, 1864, the late Gen. Joseph Holt, Judge-Advocate-General of the Army, remarked: "It has been repeatedly held by this Bureau (the Bureau of Military Justice, now Judge-Advocate-General's Department), that an irregularity in the findings under one of the several charges does not invalidate the proceedings where the remaining charges are sufficient in force to support the sentence awarded by the court."

In another opinion of the same distinguished jurist, dated April 26, 1865, he says: "* * * Where the finding of guilty upon one of the charges is disapproved by the reviewing officer, the sentence may

be still enforced as supported by the approved finding upon the other charge, provided such sentence as authorized by law is a proper penalty for the specific offense." * * * (Digest of Opinions of Judge-Advocate-General, paragraph 18, p. 350, edition 1868.)

Attention is also invited to an opinion of the same officer dated October 17, 1864, to the same effect and holding that the view stated was well established by frequent rulings upon the point in question.

In later opinion of Judge Holt, dated September 12, 1867, the substance of which is published in the Digest of Opinions of Judge-Advocate-General, paragraph 23, page 343, edition of 1868, it is said that "Where there is a single charge and specification of which the accused is found guilty, which will support the sentence embraced—*held*, that an application after trial to have the proceedings set aside on the ground that the charges on which he was convicted are when taken together inconsistent and incompatible, being the nature of a motion in arrest of judgment, can not be entertained." And he recommended the enforcement of the sentence.

In addition to these opinions as illustrative of the practice discussed in them, general court-martial orders emanating from the War Department and the Headquarters of the Army show many cases tried before courts-martial in which the original sentences imposed were approved, although some of the findings had been disapproved. These precedents cover many years. And the same practice has been followed in cases published in court-martial orders of armies, army corps, divisions, and territorial departments.

The original articles of war governing the action of the reviewing officer of the court-martial record is the sixty-fifth article of the articles enacted by Congress in the act of April 10, 1806 (2 Stat. L., 259), and reads in part as follows: "* * * No sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being. * * *"

Upon the revision of the statutes in 1874, the compilers of the Revised Statutes introduced a change in the language of the law, and the foregoing part of the sixty-fifth article of war was made to read under the new enactment as follows: "No sentence of a court-martial shall be carried into execution until the whole proceeding shall have been approved by the officer commanding for the time being," thus requiring an approval of the whole proceedings, when in fact the previously existing law provided only that "no sentence shall be carried into execution until the whole proceedings shall have been laid before the officer ordering" the court.

On December 5, 1890, the Acting Judge-Advocate-General of the Army submitted to the Secretary of War a draft of a bill amending the one hundred and fourth and one hundred and tenth articles of war, in support of which he said: "By the one hundred and fourth and one hundred and tenth articles of war it is required that the sentence shall not be carried into execution until the 'whole proceedings' have been approved by the officer ordering the court, etc. In

practice, however, it has always been held sufficient when enough of the proceedings was approved to justify the sentence, and it should be so, in view, especially, of the fact that the accused persons are often arraigned on several charges and specifications, and that there may be a fatal defect or failure of proof as to some charge of which the accused has nevertheless been convicted, leaving, however, sufficient findings under the other charges to sustain the sentence. As amended, these article of war would simply require the sentence approved." Congress, in the act of July 27, 1892, adopted this recommendation, and the one hundred and fourth article now reads: "No sentence of court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court or by the officer commanding for the time being." This brings the one hundred and fourth article of war into harmony with the provisions of the one hundred and fifth, one hundred and sixth, and one hundred and seventh articles of war, under which approval of the sentence also is required.

This amendment terminated the practice under which the proceedings and findings were required to be formally and expressly acted upon. Nothing more is required under the law as it is in force since 1892 than that the sentence should be expressly approved or disapproved. (Opinion of Judge-Advocate-General of January 2, 1897.)

This is the view taken by the latest text writers on military law in discussing the action of the reviewing officer under the one hundred and fourth article of

war. (1 Winthrop's Military Law, 2d ed., 685 to 693; Davis's Treatise on Military Law, 537–541.)

In *Mills* v. *Martin* (19 Johns, 7 and 30), the validity of a court-martial sentence was involved, and its confirmation under the then existing sixty-fifth article of war, subsequently the one hundred and fourth article of war, Judge Platt, in speaking for the court, held: "It seems clear that every sentence of a court-martial is interlocutory and inchoate until an order of confirmation by the commanding officer. * * * The proceedings of the court-martial were not definitive, but merely in the nature of an inquest to inform the conscience of the commanding officer." This opinion is quoted with approval by this court in the case of *Runkle* v. *United States* (122 U. S., 555).

The sentence in this or in any other court-martial case, in so far as the action of the court is concerned, is in the nature of a recommendation only. Approval is necessary, not only to vitalize the sentence, but to give it substance as material upon which further official action can be predicated. (1st Winthrop's Military Law, 2d ed., 685.) The law, the one hundred and fourth article of war, makes the approval of the sentence by the reviewing officer the only essential requisite to the taking effect of the sentence. (1st Winthrop's Military Law, 2d ed, 686.) The approval so made was final and conclusive in this case.

That the right so to approve the sentence, notwithstanding the disapproval of some of the findings, has been clearly established, not only by the precedents hereinbefore cited, but also by the long-existing prac-

tice in this respect, evidenced by these precedents and supported by the opinions of the Judge-Advocate-General and those of text writers on military law.

In approving certain findings the President has merely followed a previously existing practice, which since the passage of the act of July 27, 1892, has no longer any legal significance in so far as the validity of the sentence is concerned. If he had remained silent in this respect, the legality of his action upon the sentence would not have been affected thereby.

Reviewing officers generally, when no occasion exists to make any remarks as to any particular portion of the proceedings, confine their action to a simple approval of the sentence, without ever mentioning either the proceedings or the findings.

Whether or not the accused was entitled to a *reduction of his punishment* under the *conviction*, as *approved by the President*, is a question which has no bearing upon the validity of the sentence as approved, but addresses itself to the discretion of the President in the exercise of his power of mitigating the punishment. It must, however, be remembered that before he could legally put in force that power it would have been necessary for him first to approve the sentence imposed by the court.

The attorney for the appellant is correct in his assertion that military law is derived from three different sources, namely: First, the Articles of War; second, the Army Regulations; third, the unwritten military law. The latter, he says, was recognized by this court

in the case of *Martin* v. *Mott*. (12 Wheaton, 19.) In this case the court laid down the rule that in the absence of positive enactments courts-martial are bound to execute their duty and regulate their modes of proceeding in accordance with the general usage of the military service, or what might be called the customary military law. This rule applies with the same force to the reviewing officer as it does to the courts under him. The President in his action has not violated this customary law; to the contrary, he followed it when he approved the sentence, notwithstanding his disapproval of certain findings.

In the brief of appellant it is claimed that, finding he could not approve all of the findings, the President should have referred the proceedings back to the court for revision. But this, again, is a matter which addresses itself to his discretion, there being no rule requiring this course of action, as claimed by the appellant's attorney. In this connection it must be remembered that between the date of the adjournment of the court-martial and the review of the case by the President one year and four months had elapsed, a war had taken place, and the members of the court-martial were scattered from the West Indies to the Philippine Islands in Asia, making their reassembling, even if considered desirable, an impossibility.

While courts-martial have their own rules of practice and procedure, and follow in the absence of them the customary military law, their action and that of the reviewing officer can not be judged by the rules governing civil courts, but the practice under military

law of approving a sentence and yet disapproving a number of the findings, as discussed in this point, has a corollary in a rule which is the accepted and settled law for the Federal courts, to the effect that on a conviction on several counts in an indictment and a sentence which did not exceed that which might be given on any one count, if any count were good on error, the court would not reverse.

This is precisely the course which the President has followed, under military law, in his capacity of reviewing officer.

In passing upon this matter the court below (Rec., p. 107, folio 2121) said:

> * * * The rule is well established that when sentence in gross is pronounced upon a conviction under an indictment containing several counts, and upon appeal or review some of these are held bad and the others are mentioned, the sentence will not be disturbed, provided it is such as could lawfully have been imposed under the counts which are upheld.
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> *Evans* v. *United States*, 584; *Clausen* v. *United States*, 142 U. S., 140; *Haynes* v. *United States*, 101 Fed. Rep., 817 C. C. A.; *Jewett* v. *United States*, 100 U. S., 832; *Peters* v. *United States*, 94 Fed. Rep., 127. In this case what was confirmed by the President is sufficient under the law to justify the imprisonment inflicted.

In concluding the argument upon this point the attention of the court is invited to the fact that the legality of the sentence under the approved findings, and the penalty clauses applicable thereto, was the special

subject of investigation on the part of the circuit court for the southern district of New York, and of the circuit court of appeals for the second circuit. Judge Lacombe held that the dismissal was legal, and that the findings of the fourth charge alone authorized the imposition of fine and imprisonment, while Judge Wallace held that, having found the prisoner to be guilty of two offenses under the sixtieth article of war, "the court was empowered under the statute to punish him as to one by fine, and as to the other by imprisonment. The sentence was not in excess of its authority;" and, further, that "it is proper to state that the other punishments imposed upon the relator by the sentence were authorized by the Articles of War."

POINT V.

It is a general rule that the jurisdiction of a court-martial having once attached by arrest of the prisoner, it retains jurisdiction for all purposes of trial, judgment, and execution. The different provisions of the sentence in this case run concurrently. The status of the accused is now simply that of a public prisoner held by the authority of the United States as an offender against its laws.

It is asserted in Point IV of the brief of the petitioner that the *prisoner having* been dismissed the service of the United States, he is no longer subject to military control and custody, and hence must be discharged from further imprisonment.

The portion of the order quoted at the outset under Point IV of the brief on behalf of petitioner is a part of the necessary action in this case. The sentence awarded by the court was not capable of execution,

under the law, until approved by the President (Articles of War 104 and 106, section 1342, R. S.). It then *became the duty of the Secretary of War* to provide for its execution. This was done in the concluding paragraph of the general orders publishing the proceedings in the case, of which an official copy is made part of the return in this case, by stating the date on which the dismissal took effect, etc. This action is *merely declaratory* of the effect of the sentence, and not a separate and independent act of the Secretary of War having for its object the severance of the prisoner from the service. The different provisions of the sentence took *effect concurrently;* the prisoner was at the time under the control of the military authorities of the United States as a commissioned officer of the Army.

Army Regulations, paragraph 944, prescribes that the term of imprisonment in a sentence begins on the date of the order promulgating it. There is no lapse of time between the date of the order, date of dismissal, and date of beginning of imprisonment.

The claim made in this point is wholly without merit and violates the first principles of jurisdiction. The Constitution gives Congress power to make rules for the government and regulation of the land forces and under this grant Congress enacted the Articles of War, in which it provided that upon conviction for certain of the offenses therein named, various punishments may be imposed. Among these are dismissal and imprisonment.

The accused was proceeded against as an officer of the Army. *Jurisdiction attached* when he was in that

status and included, therefore, not only the power to hear and determine the case, but also the right to pronounce the sentence of the law and the *power to execute* and enforce what has been decreed.

The fact that the officer or soldier being sentenced with the confinement to dismissal or dishonorable discharge, and has been accordingly dismissed or discharged, affects in no manner the due course of the execution of the punishment. The military jurisdiction having once duly attached in his case while he was an officer or soldier, and he having been as such duly tried, convicted, and the sentence of confinement having been duly approved, it is immaterial to its execution whether he actually remains or not in the military service, his status being now simply that of a public prisoner held by the authority of the United States as an offender against its laws. (1 Winthrop, 646.) In the case of *Barrett* v. *Hopkins* (7 Fed. Rep., 312), the court held that the jurisdiction of the court-martial having once attached by arrest of the prisoner, it retains jurisdiction for all purposes of trial, judgment, and execution. In delivering the opinion of the court, Circuit Judge McCreary said:

> That the prisoner was a soldier of the United States Army at the time he committed the offense, and that he was lawfully arrested and imprisoned by military authority and remained lawfully in the custody of the military from September 6, 1878, to February 1, 1879, is admitted. But it is insisted that on the last-named day he ceased to be a soldier by the

expiration of his five years' term of enlistment and became a citizen, and therefore entitled to trial by jury. Congress, under its powers to make rules for the government of the Army and Navy, has power to provide for the trial by courts-martial of "cases arising in the land or naval forces." (Fifth amendment of the Constitution.) The case of the prisoner clearly arose in the land forces within the meaning of the Constitution. He was a private soldier, on duty with his command, and he committed an assault upon a fellow-soldier. Congress had power, therefore, to confer upon a court-martial jurisdiction over the offense. The jurisdiction is plainly conferred by the sixty-second article of war. * * *

The proceedings against the prisoner having been instituted while he was clearly within the jurisdiction of the military authority by the preferring of the charges and by his arrest, as well as by the forwarding of the charges to headquarters, with an application for the appointment of a court-martial for his trial, the question for determination is, Did that jurisdiction cease and expire at the end of the prisoner's term of enlistment, so that all proceedings after that date were void?

The general rule is that when the jurisdiction of a court attaches in a particular case by the commencement of proceedings and the arrest of the accused, it will continue for the purposes of the trial, judgment, and execution. This rule has long been recognized by the War Department as applicable to cases properly instituted before a legally constituted military court-martial,

and in which, before the conclusion of proceedings, the term of enlistment of the accused expires. (Winthrop's Dig. Op. of Judge-Advocate-General, 1880, p. 210.)

The general rule is grounded in sound reason. Many of the greatest military offenses are not cognizable by the courts of common law. A soldier might be guilty on the eve of the expiration of his term of enlistment of the grossest insult to his officers, or of disobedience of orders, or of desertion in the face of the enemy, and if he could not be held for trial after the end of his term he would escape punishment altogether. To hold that in every such case the jurisdiction of a court-martial would cease with the expiration of the term of enlistment would be to shield the guilty from punishment, to encourage crime, to greatly demoralize the military service. The jurisdiction, therefore, in such cases is to be maintained upon the highest considerations of public policy.

But such considerations are not alone sufficient to support the jurisdiction of a court which has power to deal with life, liberty, and property. The jurisdiction of a criminal court must rest upon sound principles of law and not merely upon consideration of public interest and convenience. It frequently happens that the guilty go acquitted because there is no lawful mode of trial and punishment provided. The jurisdiction in the cases named, and in many others of like character, must therefore be upheld upon the ground first mentioned, to wit, that the

> court-martial acquired it by the proper commencement of proceedings, and could not be divested of it by any subsequent change in the *status* of the accused; and this reason applies as well to a case where the crime is one known to the common or statute law as to one in which the offense is purely military. In both the jurisdiction is mentioned, after the end of the term of enlistment, upon the same ground. This conclusion is supported by judicial interpretation in the only cases, so far as I know, in which the case has arisen. (*United States* v. *Travers*, 2 Wheeler, 509; *In re Dew*, 25 L. R., 540; *In re Bird*, 2 Sawy., 33; *In re Walker*, 3 Am. Jurist, 281.)

Upon establishing the military prison at Fort Leavenworth, Kans., Congress, in the act of March 3, 1873, section 1361, Revised Statutes, provided that—

> All prisoners under confinement in said military prison undergoing sentence of courts-martial shall be liable to trial and punishment by courts-martial, under the Rules and Articles of War, for offenses committed during said confinement.

The statute was judicially passed upon by the United States district court of Kansas in the case of *Ira Wildman* (Fed. Cases, 17653a), who had been dishonorably discharged in connection with the sentence of imprisonment, and had been tried under the statute quoted by a court-martial for certain offenses and sentenced to additional imprisonment. Application for release on writ of habeas corpus was made, but denied

on the ground that though no longer in service he was a military prisoner and for purposes of discipline and punishment connected with the military service, that his case is to be regarded as one arising in the land forces in the sense of the Constitution, and therefore one in regard to which Congress may exercise its power of regulation and government.

The same case came before Attorney-General Devens, who, in his opinion of March 26, 1879, concurred in the opinion of the court in the Wildman case:

In *Re Craig* (70 Fed. Rep., 971), a similar case, the court held that:

> Prisoners under confinement in military prisons undergoing sentence of courts-martial, although dishonorably discharged, are nevertheless liable to trial and punishment for offenses they may commit during their confinement, and the act of Congress of March 3, 1873, permitting such trials, is not in conflict with the fifth amendment to the Constitution.

(See 16 Opinions Attorney-General, 292; *In re Bogart*, 2 Sway., 396; Fed. Cases, 1596; *Ex parte Wildman*, Fed. Cases, 17653-a.)

The act of March 2, 1895 (28 Stats., 951), transferred the military prison at Fort Leavenworth from the War Department to the Department of Justice, to be known as the United States Penitentiary, and provided for the confinement of persons "convicted by courts-martial of offenses now punishable by confinement in a penitiary and sentenced to terms of imprisonment of more than one year."

This is the prison in which the prisoner is serving his imprisonment.

This court, in the case of *Coleman* v. *Tennessee* (97 U. S., 915), held that a soldier who had been convicted of murder and sentenced to death by a general court-martial in 1865, but the execution of whose sentence had been meanwhile deferred by reason of his escape and the pendency of civil proceedings in his case, might at the date of the ruling (October term, 1878) "be delivered up to the military authorities of the United States, to be dealt with as required by law."

More recently in the same case (May, 1879, 16 Opinions, 349) it has been held by the Attorney-General that a death sentence might legally be executed, notwithstanding the fact that the soldier had meanwhile been discharged from the service; such discharge, while formally separating the party from the Army, being viewed as not affecting his legal status as a military convict. But, in view of all the circumstances of the case, it was recommended that the sentence be commuted to imprisonment for life or a term of years. The sentence was finally commuted to imprisonment for twenty years.

In the case of *Bogart* (2 Sawy., 307), who was detained for trial before a naval court-martial for embezzlement, in violation of the act of March 2, 1863, it was held, in the opinion of the court discharging the writ of habeas corpus granted for alleged illegal detention, that a person charged with embezzlement under the act cited committed while employed in the naval service and afterwards dismissed or discharged

was liable, under the second edition of said act, to be arrested and tried by a court-martial in the same manner as if he had not been discharged or dismissed. (See concluding portion of article 14, section 1624, Revised Statutes.)

Said second section reads as follows: "And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

It will be observed that the act here cited is the basis of the present sixtieth article of war, section 1342, Revised Statutes, under which the accused in this case was tried and convicted of two specific offenses.

In the *Esmond case* (5 Mackey, 74) the prisoner was sentenced by court-martial to dishonorable discharge and one year's confinement in the penitentiary. Under habeas corpus proceedings before the supreme court of the District of Columbia the sentence was held to be legal.

In the case of *Ex parte Mason* (105 U. S., 696), who was sentenced by a general court-martial to dishonorable discharge, forfeiture of pay, and eight years' imprisonment in the Albany penitentiary, the legality of the punishment imposed was questioned in the application for release on habeas corpus, but the application

was denied and the sentence held to be legal by this court.

The case of an enlisted man sentenced to dishonorable discharge and confinement at hard labor for a definite period, is analogous to that of an officer sentenced to be dismissed and to be confined in the penitentiary. In point of fact, the dismissal in the one case is equivalent to the dishonorable discharge in the other. The principle of amenability to jurisdiction in both cases is the same and rests on the same foundation.

The identical point four now made in brief on behalf of petitioner in this case, and the identical answer made thereto in point five of this brief for the respondent, was considered by the circuit court of appeals for the second district in the case of *Carter* v. *Roberts*, and Judge Wallace held in respect thereto, as stated in his opinion, as follows:

> The appellant has urged the proposition that the relator, having been dismissed from the service, was not therefore amenable to military authority. If by this is meant to be said that he was no longer lawfully in custody under the sentence of imprisonment, the proposition has not sufficient color of merit to require discussion.

POINT VI.

The President has not fixed the limits to the punishment of officers of the Army by courts-martial upon conviction of offenses under any of the articles of war, leaving the punishment to the discretion of the court.

In the fifth point of appellant's brief it is asserted that the sentence of the court-martial was beyond its

powers, illegal and void, because the punishment assessed therein exceeded the maximum punishment fixed by the President of the United States, in accordance with the law. It is also claimed that allegations to the same effect are made in the petition before the court below and are not traversed in the return. Reference is again made to the treatment of this subject in the statement of this brief where it is clearly shown that the return in the case denied this and all other allegations relating to the sentence. The act of Congress approved September 21, 1890 (27 Stat. L., 491), provides that, "Whenever by any of the Articles of War for the government of the Army the punishment and conviction of any military offense is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe."

The enactment is copied into article 938 of the Army Regulations of 1895, now in force, and there is added to it the following clause: "The limits so prescribed are set forth in the Manual of Courts-Martial published by authority of the Secretary of War."

Army Regulations are full of paragraphs embodying verbatim provisions of statutes for the information of the Army, for the exigencies of the service do not admit the carrying about on the part of officers, etc., of ponderous volumes of Revised Statutes and of the Statutes at Large.

Let us bear in mind that there can be no other limit under the statute cited than that fixed by the President.

On February 26, 1891, the President published in

an Executive order his first code of limitations of punishment, which was promulgated to the Army in General Orders, No. 21, Headquarters of the Army, Adjutant-General's Office, Washington, D. C., February 27, 1891, and in the first paragraph of his code the President says: "In accordance with an act of Congress approved September 27, 1891, the following limits to the punishment of enlisted men, together with the accompanying regulations, are established for the government in time of peace of all courts-martial and will take effect thirty days after this order."

Nowhere in the orders are its provisions extended to commissioned officers, and the entire structure of it clearly shows that it solely relates to the cases of enlisted men.

This Executive order was amended by President Cleveland on March 20, 1895, and was again amended by Presideat McKinley on March 30, 1898, and the latter has been in force ever since. The former is to be found in the Manual for Courts-Martial, published by direction of the Secretary of War, edition of 1895. In neither of the Executive orders of the Presidents named has the original purpose of confining the action taken to the punishment of enlisted men been changed or modified.

So that it may be asserted without fear of contradiction that no limit of punishment for commissioned officers is in existence, or has ever been fixed, under the act quoted and the regulation cited by the petitioner in support of his assertion. But even if the limits of punishment described in the executive order

now in force, herein mentioned, were applicable to the cases of commissioned officers, they would not afford any help to the prisoner, for in that order the President fixes the maximum punishment for violation of the sixtieth article of war to four years' confinement at hard labor, and a like period of confinement is fixed for embezzlement of more than $100 under the sixty-second article of war. The prisoner has been convicted of embezzlement of more than $575,000 and a violation of the sixtieth article of war, and he would thus be subject to a maximum punishment of eight years.

From all this it follows that the contention in fifth point of brief on behalf of appellant is without foundation and merit.

Judging from the fact that the opinion of the court below omitted to refer to this objection, it follows from the concluding portion of the opinion of the court that it did not merit consideration.

POINT VII.

It was not admitted in the record that no evidence whatever was delivered before the court-martial tending to show the guilt of Oberlin M. Carter.

In the sixth point the attorney for appellant again claims that the return failed to deny the allegation in the petition that there was no evidence adduced before the court-martial that crime had been committed by Oberlin M. Carter, and that therefore, by the well-known rule of pleading, the accused stands acquitted.

The utter fallacy and groundlessness of this claim has been thoroughly shown by the appellee in his

statement of the case that it is deemed unnecessary specially to discuss this matter again. It is, however, to be remarked that the question of the guilt or innocence of the accused under the evidence adduced was not in issue before the court below. The determination of this question belonged to the trial court and the reviewing officer, and the court below in a habeas corpus proceeding is without jurisdiction in these particular premises, for it is a well-settled rule that the writ of habeas corpus was not framed to retry issues of fact or to review the proceedings of a legal tribunal. (Church on Habeas Corpus, 350.)

POINT VIII.

The judgment of the circuit court discharging the writ of habeas corpus and remanding the prisoner to the custody from whom he was produced should be affirmed.

JOHN K. RICHARDS,

Solicitor-General.

JOHN W. CLOUS,

Special Assistant to the Attorney-General.

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